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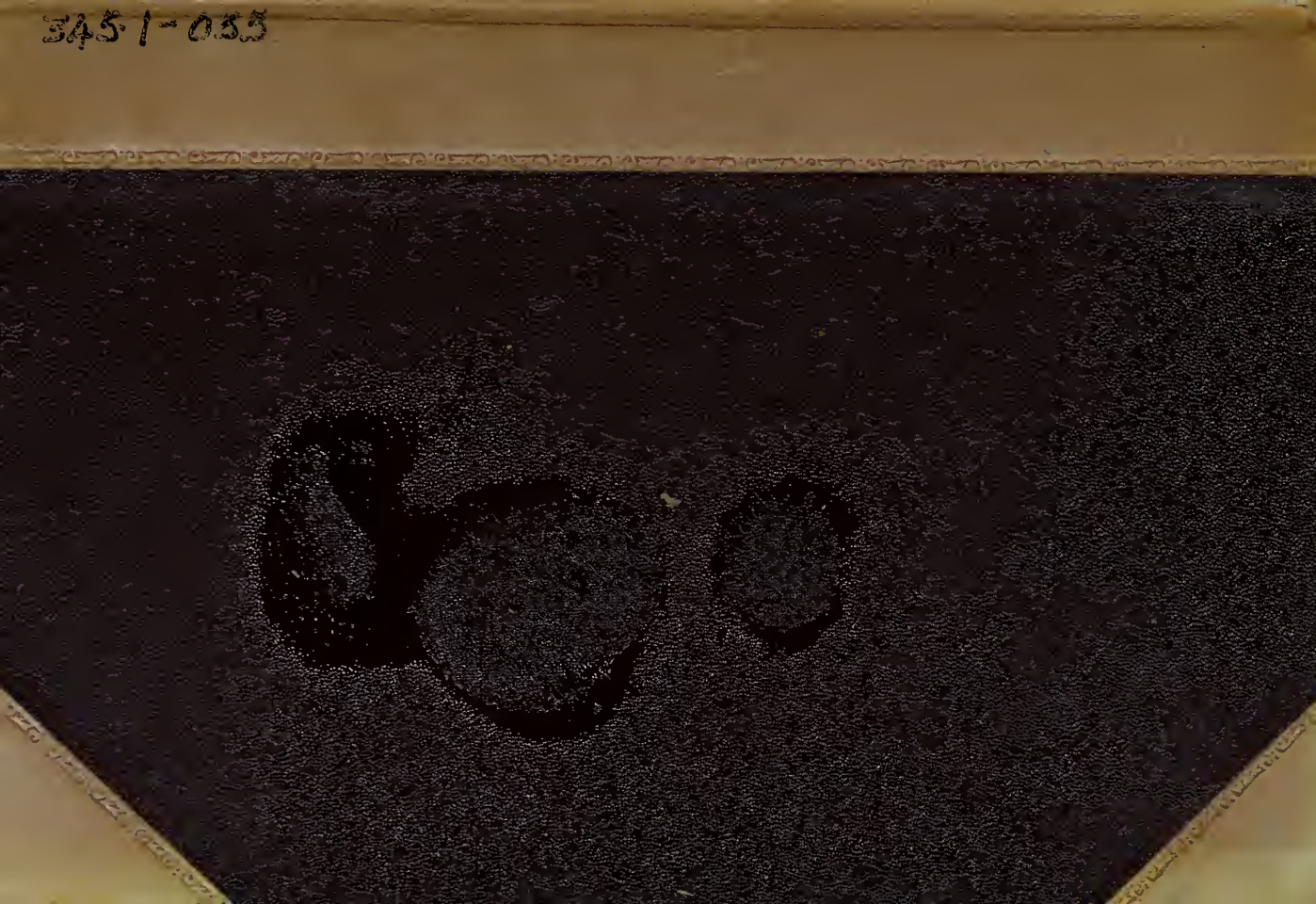

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# VERSLAE

VAN DIE

# BANTOE-APPÈLHOWE

# 1969

# REPORTS

OF THE

# BANTU APPEAL COURTS

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# NORTH-EASTERN BANTU APPEAL COURT

## JALI vs JALI AND OTHERS

B.A.C. CASE 86 OF 1967.

DURBAN: 25 March 1969: Before E. J. H. Yates, President and Craig and Warner, Members of the Court.

## BANTU LAW AND CUSTOM

*Damages—non-joinder of kraalhead of tort-feasor.*

*Summary:* Judgment by default in a Chief's Court for damages for crop destruction was awarded against a woman duly assisted by her husband who was her kraalhead. Subsequently execution was levied against the kraalhead's property and a beast was attached and sold by the one Defendant (the Chief) at the instance of the other two. The husband sued the Defendants in the Bantu Affairs Commissioner's Court for the return of his beast or its value and the Commissioner held that his beast had been properly attached and awarded judgment in favour of Defendants.

*Held:* That as the kraalhead of the tort-feasor had not been joined as a party to the case his property was not subject to attachment and that he should have succeeded in his claim.

*Cases referred to:*

*Nkomo* v *Siqova* 1909, N.H.C. 44.

*Sosibo* v *Sosibo* 1939, N.A.C. (T. & N.) 145.

*Mcunu* v *Nkabini* 1938, N.A.C. (T. & N.) 29.

*Mtembu v Koza* 1964, N.A.C. (N.E.) 1.

*Mhlongo* v *Nzuza* 1935, N.A.C. (T. & N.) 13.

*Works referred to:* "A Digest of S.A. Native Civil Case Law" para. 426.

*Laws referred to:* The Natal Bantu Code—Proc. R195 of 1967.

Appeal from the Court of the Bantu Affairs Commissioner, Pinetown.

Yates, President:—

Good cause having been shown and the application not being opposed condonation of the late noting of the appeal was granted.

Plaintiff (now Appellant) sued the Defendants (now Respondents) for the return of a certain red and white bull which he alleged had been wrongfully removed from his possession or its value R64.00. The Defendants averred that "the bull was attached and sold in execution in satisfaction of a judgment against Plaintiff's wife and Plaintiff was held to be liable in terms of Bantu Law and Custom as Plaintiff's wife was at all material times in residence at the same kraal as the Plaintiff and the action was based on Bantu Law and Custom".

The Additional Bantu Affairs Commissioner's judgment reads as follows:—

"Judgment for first, second and third Defendant. Plaintiff's action dismissed with costs".

What the presiding officer meant to convey is not clear as the first sentence indicates an outright judgment for Defendants whereas the dismissal of an action amounts to an absolution judgment (see the numerous cases cited in Warner's "Digest of S.A. Native Civil Case Law" at paragraph 3391). However, it appears from his "Reasons for Judgment" that he intended a judgment for Defendants with costs.

An appeal was brought against this judgment and Mr Ruiter relied solely on ground (2) which reads:—

> "That the Learned Presiding Officer erred in finding that all or some or one of the Defendants were/was entitled to levy execution against the property of the Plaintiff in that Plaintiff was not a party to the action before the Chief's Court."

According to the evidence of the Clerk of the Bantu Affairs Commissioner's Court a judgment was given by Defendant No. 2 in favour of Defendant No. 1 against Mabuneni & Eunice Jali duly assisted by her husband Tulani & Allison Jali, the Plaintiff in the instant case, by default for payment of R20.00 and costs R4.75. Defendant's claim in that case was for an amount of R80 in respect of damage to her maize caused by Mabuneni. This judgment was recorded in the Commissioner's Civil Record Book on 8 May 1964.

That judgment has never been rescinded or altered on appeal and still stands. Plaintiff alleged that he made attempts to have the judgment rescinded which, for the purposes of this case, is irrelevant.

In pursuance of that judgment which has not been satisfied the beast in question was attached on 9 September 1965, and subsequently sold. Plaintiff issued the present summons on 16 February 1966.

Mr Ruiter argued that as Plaintiff was not a party to the proceedings section 141 of the Natal Code applied, i.e.—

> "141. (1) A guardian is liable in respect of delicts committed by his ward while in residence at the same kraal as himself.
>
> 141. (3) Legal proceedings arising out of any delict such as is referred to in subsection (1) or (2) may be instituted against either the person committing the delict or such person jointly with his father, guardian or kraalhead as the case may be."

He contended that the action in the Chief's court had been brought against Plaintiff's wife and not against Plaintiff himself. The Commissioner found as a fact that Plaintiff was a party to the action and based his decision on the fact that Plaintiff had stated in his evidence that he knew he had to appear in the Chief's court to listen to the evidence on behalf of his wife because she was like his child. However, the inference to be drawn from this evidence could also be that he was there merely to assist her. Furthermore in their pleas the Defendants admitted that the bull was attached in satisfaction of a judgment against Plaintiff's wife. Moreover the Chief's judgment as recorded was against "Mabuneni Jali duly assisted by her husband". In his evidence the Chief, Defendant No. 2, stated that he had given a default judgment against Plaintiff's wife, duly assisted by her husband and this was confirmed by the evidence of the tribal constable who stated that Plaintiff was required to appear to assist

his wife and listen to the proceedings. Plaintiff's wife also stated that she understood that the action was against her. It is clear therefore that Plaintiff was not regarded as a principal but was merely called to attend to assist his wife, and it is not disputed that he did not respond and did not appear in the Chief's court.

Mr Ruiter drew attention to the case of *Nkomo* v. *Siqova,* 1909, N.H.C. 44 quoted with approval in the case of *Mkali Sosibo* v. *Matshezi Sosibo* d/a by *Ngwazeni Sosibo,* 1939, A.N.C. (T. & N.) 145 in which it was held that a guardian, unless made a party to the action, cannot be held responsible for non-compliance with an order made against his ward. See also *Mcunu* v. *Nkabini,* 1938, N.A.C. (T. & N.) 29 in which it was stated that " unless guardians are made parties to the action by being joined as co-plaintiffs or co-defendants as well as merely assisting to give the legal standing to their wards suing in their own right they cannot be held responsible for non-compliance by their wards for orders made against the latter. A guardian is not liable for costs awarded against his ward when merely cited to appear duly to assist the ward as that does not make him a party to the action". Furthermore in that case it was stated that where the guardian as kraalhead is liable for debts contracted by other members of his kraal the liability must be established in court and become a judgment against him before an attachment of his goods can be made.

In the case of *Mtembu* v. *Koza,* 1964, N.A.C. (N.E.) 1, it was accepted that the practice and procedure in a Chief's court was as stated by the assessors viz. in an action for seduction against a tort-feasor the father is required to attend the trial " for he should know the particulars of the case as eventually it comes upon him so that when the attachment is made it will be made at his kraal and it will then prevent him from saying that he knew nothing of the case because the boy's tort must be paid for by his father. Judgment is given against the boy but the actual amount will be paid by the father ". In that case however the court also accepted that the tort-feasor's father attended the trial, was ordered to pay the seduction fee and was regarded as being jointly sued with his son. There was no suggestion that he was present " duly assisting " his son.

In the case of *Mhlongo* v. *Nzuza,* 1935, N.A.C. (T. & N.) 13, it was held (Liefeldt dissenting) that under Bantu law and custom the fact that a husband who is liable for the torts of his wife is cited as " assisting his wife " does not free him from any liability in any judgment that may be given; but that judgment was considered and overruled in *Mcunu's* case (*supra*).

In the instant case the judgment was given against the wife, duly assisted by her husband and he cannot be made personally liable on the judgment.

The appeal is allowed with costs and the Bantu Affairs Commissioner's judgment altered to read " For Plaintiff as prayed with costs ".

Craig, Member, concurred.

Warner, Member, dissenting:—

It is clear from the several decided cases quoted by learned President in his judgment that a guardian can not be held liable for the torts of his ward unless he has been cited as a party to

the action. It is also correct that the judgment given by Defendant No. 2 in favour of Defendant No. 1 was recorded as being "against Mabuneni duly assisted by Tulani Jali."

The Defendants in the Court below maintained that the intention in the Chief's court was to cite the Plaintiff as a party to the action and the learned Additional Bantu Affairs Commissioner was entitled to hear evidence on this point—see *Gumede* v. *Madhlala,* 1954, N.A.C. (N.E.) 147.

Chief's courts are not courts of record and it is therefore difficult to determine exactly in what form a claim is brought, but Defendant No. 1 under cross-examination stated—

> "I sued Plaintiff's wife as the person who committed the offence and her husband the Plaintiff as the person responsible for the action of his wife".

Her action was brought under Bantu law and custom and in terms of this the Plaintiff, as guardian, is liable for the torts of his wife while she is living at his kraal—see Seymour, Second Edition, page 55, and section 141 (1) of the Natal Native Code

I feel that the principles enunciated in the case of *Mtembu* v. *Koza,* 1964, N.A.C. (N.E.) 1 apply to the present case, the only difference being that the Plaintiff in the present action failed to appear before the Chief, in spite of having been instructed to do so.

It is clear that Plaintiff understood that he was also being held liable for his wife's alleged delict. In evidence he stated:—

> "When I became aware of the judgment against my wife I did take steps. I came to the Clerk of the Bantu Affairs Commissioner's Court. After I told him what had happened he advised me to go and see the chief to try the case afresh. I did go to the chief and he informed me that he would not withdraw his judgment.";

under cross-examination by Second Defendant:—

> "Q: I put it to you you never came to ask me that the case be tried afresh.
>
> A. I personally came and spoke to you on a Sunday morning."

His evidence and his attorney's letter at Exhibit B reveal his efforts to have the default judgment rescinded. There is no suggestion that he disclaimed responsibility for his wife's delict or that he was not a party to the action, and the learned Additional Bantu Affairs Commissioner was therefore justified in placing the construction he did on Plaintiff's words:—

> "Q. Did you know in what capacity you had to appear in the Chief's court.
>
> A. Yes I did know I was to appear there and stand as a person who listens to evidence on her behalf.
>
> Q. Why did you have to listen to evidence on her behalf.
>
> A. Yes because she is just like my child."

I feel that the Defendants have discharged the onus of showing that Plaintiff was a party to the undefended action before Defendant No. 2 and that the appeal should be dismissed with costs, but that the judgment of the learned Additional Bantu Affairs Commissioner be amended to read: —

"Judgment for Defendants, with costs."

For Appellant: Adv. R. G. Ruiter i.b. R.A.V. Ngcobo.

For Respondents: In person.

## CENTRAL BANTU APPEAL COURT

**SITHOLE vs. SITHOLE**

ROLL 4 OF 1969

JOHANNESBURG: 3 April and 6 May 1969

Before Potgieter, President, and Thorpe and Van Wezel, Members.

## HUSBAND AND WIFE

*Divorce—Appointment of receiver and liquidator to give effect to an order for forfeiture of benefits.*

*Summary:* The appellant and respondent who had been husband and wife respectively of a marraige in community were divorced in June 1965, the decree providing *inter alia* that there would be a forfeiture of benefits in favour of the respondent. More than two years later the respondent issued summons which after amendment alleged in effect that merely by virtue of the order for forfeiture she was entitled to the appointment of a receiver and liquidator. It was clear from the evidence that the respondent had instituted the action with a view to obtaining for herself a share of the estate after liquidation thereof.

*Held:*

(1) A party, who asks that a share of the assets of a joint estate or of the proceeds thereof be awarded to him, should allege in his particulars of claim sufficient to show that there is a prospect that those assets or the proceeds thereof exceed in value the debts due by the joint estate.

(2) To make out a cause of action there must normally be an allegation to the effect that the parties cannot agree on the distribution.

(3) Where a party has made a genuine but unsuccessful attempt to obtain a distribution in terms of an order for forfeiture, that party is entitled to ask a court for assistance to give effect to the order, either by making the distribution itself or by appointing a receiver. Preferably, this alternative should appear in express terms in the prayer.

(4) The prayer must indicate the powers with which it is sought to clothe the receiver, and these should include, expressly, the authority to pay debts due by the estate.

(5) A court's discretion is not limited to a simple choice between the alternatives of (a) itself effecting a distribution or (b) appointing a receiver. The aim of the court should be to give effect to the order for forfeiture in as efficacious a manner as possible and, even if it should transpire that the appointment of a receiver is necessary, it may well be that this aim could best be achieved by making certain findings, on the basis of which the receiver can be given a clear directive. A receiver's main function should be merely to liquidate the assets, pay the debts and distribute the balance between the parties in a certain ratio, and it would appear desirable that the Court should determine this ratio. *inter alia.*

*Cases referred to:*

*Gates* v. *Gates,* 1940, N.P.D. 361.

*Opperman* v. *Opperman,* 1962 (1) S.A. 456.

*Revill* v. *Revill,* 1969 (1) S.A. 325.

*Gillingham* v. *Gillingham,* 1904 T.S. 609.

*Works of reference:*

Hahlo: "The S.A. Law of Husband and Wife" 2nd Edition, pages 421 to 424. (The corresponding pages of the 3rd edition of this work are 428 to 433.)

Appeal from the court of the Bantu Affairs Commissioner, Germiston.

Thorpe, Permanent Member:

The appellant and respondent, who had been husband and wife respectively of a marraige in community of property, were divorced on the 28th June, 1965, the degree being granted in favour of the respondent, who was plaintiff-in-reconvention in that case. The decree reads as follows:—

"The Court grants judgment for plaintiff-in-reconvention for dissolution of the said marriage with costs. It is ordered that the defendant-in-reconvention forfeit the benefits arising from the marraige. Custody of the four minor children is awarded to the plaintiff-in-reconvention. Defendant-in-reconvention is to have access to the children at all reasonable times. The defendant-in-reconvention is ordered to pay maintenance of R7 a month for each child until it becomes self-supporting. The first payment must be made on or before the 7.8.1965 and all subsequent payments on or before the 7th day of each succeeding month thereafter. All payments must be made to the Bantu Affairs Commissioner, Germiston."

On the 29th September, 1967, the respondent summoned the appellant and gave the following particulars of claim, the first paragraph thereof being numbered "2":—

"2. Defendant obtained a Decree against the plaintiff in the Central Bantu Divorce Court on the 28th June, 1965. It was further ordered that the assets of the joint estate be divided equally between the plaintiff and defendant.

3. Plaintiff is entitled in law to the appointment of a Receiver and Liquidator for the purpose of receiving and liquidating the estate according to law.

4. That Benjamin Edgar Leo, Accountant of Johannesburg, is a fit and proper person to be appointed as Receiver and Liquidator of the assets of the Joint Estate and has agreed to act in such capacity.

Wherefore plaintiff prays for an Order—

(a) Appointing Benjamin Edgar Leo as Receiver and Liquidator of the assets of the joint estate of plaintiff and defendant with full power to—

(i) receive, liquidate and distribute the assets according to Law, and with full power to divide the joint estate as Ordered by the Central Bantu Divorce Court on the 28th June, 1965;

(ii) institute legal proceedings against any persons for the delivery to him of any assets, deeds or documents which vest in the joint estate, in whatever Court it shall be appropriate to bring such proceedings;

(iii) instruct and appoint attorneys and Counsel to institute proceedings on his behalf for the purpose of obtaining delivery of any assets alleged to belong to the joint estate, and to claim such other or further relief as the circumstances may require;

(iv) sell and dispose of any assets including immovable property of the joint estate, either by private treaty, public auction or tender, or in such manner as he may deem fit—under such terms or conditions as he may deem fit, subject to confirmation by the Bantu Affairs Commissioner;

(v) Sign and execute any documents, deeds or papers that may be necessary to effect transfer of any of the properties in the joint estate to whosoever may acquire same from the Receiver.

(b) Alternative relief.

(c) Costs of Suit."

The appellant's plea, as amended by the insertion of an additional paragraph 4 (a), reads—

"1. *Ad Paragraph* 2.—Defendant denies the allegations therein and pleads that the Order of the Central Bantu Divorce Court granted on the 28th June, 1965, was for the forfeiture of the benefits arising from the marraige and not for the division of the joint estate.

2. *Ad paragraph* 3.—Defendant denies the allegation therein and specially denies that the plaintiff is entitled in law to the appointment of a Receiver and Liquidator as claimed.

3. *Ad paragraph* 4.—Defendant denies each and every allegation therein.

4. Defendant pleads that no attempt has been made by the Plaintiff to discuss with him the question of carrying out the order of fofeiture and the division of the joint estate

between the parties and Defendant therefore denies that it will be in the interest of the estate to have a Receiver and Liquidator appointed.

4. (a) That Plaintiff removed from the joint estate and retained the following assets:—

| | R |
|---|---|
| 1 Wardrobe valued at | 57.25 |
| 1 Wardrobe valued at | 32.00 |
| 1 Bed valued at | 19.95 |
| 1 Radiogram valued at | 105.95 |
| 1 Kitchen dresser valued at | 54.00 |
| 1 Table and 4 chairs valued at | 29.95 |
| 2 Dining-room chairs valued at | 8.50 |
| 1 Small table valued at | 7.00 |
| 2 Children's beds valued at | 16.00 |
| 12 Blankets valued at | 84.00 |
| 6 Pillows valued at | 2.70 |
| 8 Sheets valued at | 16.00 |
| Kitchen pots and utensils valued at | 24.00 |
| Baskets valued at | 3.50 |
| Household crockery and cutlery valued at | 10.00 |
| | R470.80 |

The aforesaid goods and articles constitute more than half of the value of the assets of the joint estate. In addition, the Plaintiff has wrongfully and unlawfully removed two men's suits belonging to the Defendant and valued at R70.00.

5. Defendant further pleads that the appointment of a Receiver and Liquidator is a matter in the discretion of the Court and that the Court should not appoint a Receiver in this instance.

Wherefore Defendant prays that Plaintiff's summons may be dismissed with costs."

On the Respondent's requesting further particulars of paragraph 4 (a) of the plea in respect of (1) the date of removal, (2) the persons who removed the said articles, (3) in what circumstances the articles were removed and whether it was by agreement, and (4) what assets constituted the remainder of the estate and what is the value of each such asset, the Appellant replied *seriatum* as follows:—

"1. On 28 June 1965, after the divorce was granted.

2. Plaintiff accompanied by a gang of about four (4) Bantu males.

3. On the evening of the 28th June, 1965, at about 7.30 p.m. Plaintiff accompanied by a gang of about four (4) Bantu males went to Defendant's house during his absence and forcibly without his consent entered the house and removed all the said articles. Plaintiff and the persons accompanying her deliberately damaged the following articles which they left in the house, viz.: Three dining-room chairs, original value R8.50 but now useless, glass top of dining-room table, valued about R10.00, coal stove, value about R10.00.

4. *Vide* paragraph 3 above.

The Respondent replicated in these terms:—

"1. Save for admissions made by Defendant, Plaintiff denies each and every allegation made by the Defendant in Defendant's plea (as amended) and the Further Particulars furnished thereunder.

2. Plaintiff joins issue with Defendant and persists in her claim."

At court the Appellant's attorney intimated that he would not challenge Mr Leo's personal suitability, but that he opposed the appointment of a liquidator. Submissions were made as to onus and the court ruled "Onus on Plaintiff. Possession of assets irrelevant to issue".

Respondent was the only one to give evidence. She testified that at the time of the divorce the estate owned property; there was a house, which was fully furnished, except for the children's room which was not completely furnished; after the divorce she went to the Appellant "to ask him for the assets"; the Appellant did not want to listen to her and chased her away; she wanted the estate to be divided in a proper way including the assets in her possession.

Under cross-examination the Respondent said that the last time she had been to the Appellant to discuss the division of the assets was in February 1966; after that she had let the matter rest until she issued summons in September 1967. She had not in the interim consulted her attorney or the Superintendent or the Bantu Affairs Commissioner. Her explanation for the delay of twenty months was that she was hoping that the Appellant would comply with the maintenance order. She did not dispute that R268.72 was owing on the house at the time of the divorce. She agreed that her sole purpose in bringing the action was to have the house sold. In re-examination the Respondent replied in the negative when asked "Did it ever come to your knowledge that Defendant was trying to sell the house?" The Respondent's case was thereupon closed, and Mr Smits, who appeared for the Appellant, followed suit by closing the latter's case, without adducing any evidence.

Judgment was entered for the Respondent as claimed and appeal to us has been noted on the following grounds:—

"1. That the judgment is bad in law and contrary to law in that—

(a) the Commissioner erred in deciding and ruling that the only matter before him in this case was the appointment of a Receiver or Liquidator of the joint estate;

(b) the Commissioner erred in refusing to allow the Defendant to lead evidence to prove that immediately after the granting of the Final Order of Divorce on the 28th June, 1965, the Plaintiff went to the common home at 6 Makula Section, Natalspruit, Germiston, and removed the household furniture and other goods detailed in the Defendant's plea and further particu-

lars and further erred in refusing to allow the Defendant to prove by such removal of assets in the joint estate that the Plaintiff effected a division in the joint estate;

(c) the Commissioner erred in refusing to allow the defence to cross-examine the Plaintiff in regard to the said household furniture and goods removed by her from the common home on the 28th June, 1965, after the divorce was granted;

(d) the Commissioner erred in view of his aforesaid ruling by allowing the Plaintiff to state in evidence that at the time of the divorce the common home was fully furnished;

(e) the Commissioner erred in granting the Judgment as prayed and appointing Benjamin Edgar Leo as Receiver and Liquidator of the joint estate having regard to the fact that—

(i) paragraph 2 of the summons incorrectly set forth that the Central Bantu Divorce Court has ordered that the assets in the joint estate be divided equally between the Plaintiff and Defendant, whereas the order was for forfeiture of the benefits arising from the marriage;

(ii) the summons was further defective in that there was no allegation that there were assets in the joint estate to be dealt with and that the Plaintiff had attempted to arrive at a settlement with Defendant to effect division thereof.

2. That the judgment is against the evidence and the weight of evidence in that—

(a) the Commissioner erred in failing to have regard to the statement made by Plaintiff that she had had no intention of bringing this action against the Defendant and was quite prepared to allow him to retain or to agree to him retaining the house and remaining goods at 6 Makula Section, Natalspruit, and that she had only brought this action against him because he had failed to pay the maintennace for the children as ordered by the Central Bantu Divorce Court;

(b) that the Plaintiff failed to prove that she had, in view of her aforesaid statement and evidence, made a genuine attempt to arrive at a settlement with the Defendant regarding the division of the assets of the joint estate;

(c) that the Plaintiff failed to prove that she was in all the circumstances entitled to the appointment of a Receiver and Liquidator of the joint estate."

It can at the outset be said that ground 1 (e) (i) of the grounds of appeal is without substance, because an amendment was granted before evidence was led, although the amendment was badly worded and resulted in an unfinished sentence. The last portion of paragraph 2 of the particulars of claim now reads: "It was further ordered that forfeiture of the benefits arising out of the marriage"

Ground 1 (e) (ii) is well founded and these points were mentioned in the Court *a quo* by Mr Smits, who appeared for the Appellant, but an exception was not pleaded as it should have been.

To my mind comment seems warranted on at least four aspects of the summons, in view of the circumstances which must exist before a receiver and liquidator (hereinafter referred to as a receiver) could be appointed.

Firstly, a party, who asks that a share of the assets of a joint estate or of the proceeds thereof be awarded to him, should allege in his particulars of claim sufficient to show that there is a prospect that those assets or the proceeds thereof exceed in value the debts due by the joint estate. It is difficult to see how this requirement can be met unless particulars of alleged assets and liabilities are set out in the particulars of claim. In the present summons, as amended, there is not even an allegation that there are any assets whatever. It is true that there is uncontroverted evidence of the existence of some assets, but this evidence is very sketchy, and, as will be shown later, insufficient to enable a Court to exercise properly its discretion whether to appoint a receiver.

Secondly, a party is not entitled to ask a Court to appoint a receiver to liquidate and distribute the assets of a matrimonial estate that has to be distributed in accordance with an order for forfeiture, unless that party has first approached the other side with a view to giving effect to that order. Consequently, to make out a cause of action, it is necessary to allege that this step has been taken. No such allegation appears in the summons. Of course, there is the maxim that pleadings are made for a Court and not vice versa and it is true that there is some uncontroverted evidence that the Respondent did approach the Appellant about the assets. On the other hand, all the Respondent said in this regard is that she went "to ask him for the assets." In the view I take of the matter it will not be necessary to decide whether this constitutes a sufficient compliance with the requirement under consideration.

Thirdly, the allegation in paragraph 3 of the particulars of claim that the Respondent is entitled in law to the appointment of a receiver is not strictly correct. Where a party has made a genuine but unsuccessful attempt to obtain a distribution in terms of an order for forfeiture, that party is entitled to ask for a Court's assistance to give effect to the order, *either* by making the distribution itself *or* by appointing a Receiver. Preferably, this alternative should appear in express terms in the prayer.

Fourthly, the Respondent in the prayer to her summons does not ask for the receiver to be clothed with authority to pay debts due by the joint estate, a function he must perform before he can make a distribution. This is not a fatal omission as it can be remedied under the prayer for alternative relief, but it is nevertheless an omission.

Furthermore, the Respondent's replication is open to criticism. What is meant by "save for admissions made by Defendant, Plaintiff denies each and every allegation etc." is not clear. What were the admissions so to say "adopted" by the Respondent?

Did she concede (1) That all the values were as stated by the Appellant? (2) That the joint estate consisted only of the articles mentioned by Appellant in his pleadings? (It is to be noted that Appellant purported in his plea to enumerate all the assets in the joint estate). If so, it seemed from the pleadings that the Respondent was not alleging that a house formed an asset in the joint estate. Yet, when she gave evidence, she indicated that a house did figure as such an asset.

On the other hand, the Appellant's plea, as amended, is also not as clear as it could be. It would seem from the grounds of appeal that the Appellant had intended to plead *inter alia* (a) that the Respondent had taken possession of assets worth at least half the value of the joint estate with a view to effecting a distribution in terms of the order of forfeiture and (b) that the Appellant's acquiescence in this action by the Respondent was a tacit agreement that this constituted a distribution. But this was not pleaded. Nor was it pleaded that the Respondent was entitled to no more than half the value of the joint estate; if Appellant had intended to plead this he should have given the basis for this contention e.g. that the value of the Respondent's contribution to the joint estate was not more than that of Appellant's. It must be remembered that the order for forfeiture was in favour of the Respondent, so if her contribution had been more than that of Appellant she would be entitled to proportionately more of the joint estate.

In his reasons for judgment the Commissioner stated that he had ruled that the only matter before the Court was the appointment of a receiver. This was not the correct approach. See *Gates* v. *Gates*, 1940, N.P.D. 361 and *Opperman* v. *Opperman*, 1962 (1) S.A. 456, which make it clear that a Court has a discretion whether to effect a distribution itself or to appoint a receiver. Sufficient evidence should therefore have been placed before the Court to enable it to decide how to exercise this discretion, and this was not done. There was, *inter alia*, no evidence of the contribution made by each spouse to the joint estate, of the value of the assets or of the extent of the debts, if any.

The meaning and effect of a Divorce Court's Order for forfeiture of benefits arising from a marriage in community are dealt with at some length in Hahlo's "The South African Law of Husband and Wife", 2nd Edition, from pages 421 to 424, *sub voce* "Where the marriage is in community." Of the points made in the authorities there quoted the following could be among those applicable to the present case:—

(1) The estate to be apportioned between the parties is the estate as it existed at the date of the final decree of divorce, after the debts due by the joint estate have been paid.

(2) The apportionment between the spouses of the balance will depend on the contribution each had made to the joint estate.

(3) (a) A contribution includes assets brought into the community at the time of the wedding as well as during the subsistence of the marriage.

(b) Included in the wife's contribution would be the value of the services, if any, rendered by her in running the joint household and caring for the children of the

marriage, in so far as such value exceeds the cost of her maintenance. It is probable that there will hardly ever be conclusive evidence on this point, but an endeavour to reach finality should be made. Thus in *Gates supra* although there appears to have been no evidence either of the value of these services or of the cost of maintaining the wife, the Court did not hesitate to estimate that the former exceeded the latter by R2 (£1) per month.

(c) To arrive at a spouse's contribution, the extent to which the prenuptial debts of that spouse have been paid out of the joint estate during the subsistence of the marriage should be deducted.

(4) In the present case the order for forfeiture was in favour of the Respondent and if her contribution was less than or equal to the value of the Appellant's contribution she would be entitled to half the balance.

(5) If the Respondent's contribution was more than that of the Appellant's and the value of the joint estate at the time of divorce was less than or equal to the contributions by each spouse, it is clear that the distribution of the balance must be made proportionately to the respective contributions.

(6) If the Respondent's contribution was more than that of the Appellant's and the value of the joint estate at the time of divorce was more than the sum of the contributions of the spouses, the position is not so clear. In *Gates supra* the Court suggested that each spouse should receive his or her contribution and that the excess should be equally divided. Hahlo, *op. cit.* p. 424, suggests that another possible solution is to divide the whole estate in proportion to the respective contributions.

(7) In arriving at the ratio between the contribution of each spouse, accurate accounting is usually out of the question, though, of course, evidence readily available should be produced. To arrive at finality, the best should be done with what evidence is available.

This was pointed out in *Gates supra*, in which case the Court found that the contributions of the spouses were respectively £476.10.0 and £122.10.0, or 47 to 12, or in other words 4 to 1, and directed that the estate which was worth £305 at the time of the divorce should be divided in the ratio of four to one.

A Court's discretion is not limited to a simple choice between the alternatives of (a) itself effecting a distribution or (b) appointing a receiver. The aim of the Court should be to give effect to the order for forfeiture in as efficacious a manner as possible and, even if it should transpire that the appointment of a receiver is necessary, it may well be that this aim could best be achieved by making certain findings, on the basis of which the receiver can be given a clear directive. A receiver's main function should be merely to liquidate the assets, pay the debts and distribute the balance between the parties in a certain ratio, and it would appear desirable that the Court should determine this ratio, *inter alia*.

In considering how best to exercise its discretion, a Court should bear in mind that it would often be in a better position to resolve certain issues than a receiver, who does not necessarily possess a knowledge of the law applicable and who does not have the power to require parties and their witnesses to be examined under oath. This could apply to such matters as: the value of the respective contributions; the extent to which the joint estate is liable for certain debts; what must be regarded as assets in the joint estate; the extent to which the value of the wife's services in running the joint household and caring for the children exceeded the cost of her maintenance, etc.

To leave such issues unresolved before appointing a receiver, would be, in many cases, merely to invite further litigation.

The object of pleadings is to identify the issues and to make them clear. It therefore seems desirable that in an action instituted solely with a view to carrying into effect an order for forfeiture granted by a Divorce Court, full particulars of the following should, as far as possible, be included in the summons, *inter alia*:—

(1) As at the date of divorce, all assets and liabilities, each being numbered so that no overlapping occurs of numbers allotted to assets and liabilities;

(2) the value of the contribution made by each spouse respectively towards the joint estate; and

(3) the value of the estate at the date of the divorce.

If the action is opposed the Defendant could admit or deny each item and, if necessary, furnish his own version of the required particulars. If these steps are taken it may well be that the parties could settle the matter, especially if they are legally represented, and if they realise that the appointment of a receiver could result in all assets being sold at less than their value to the parties. At least, the Court will have as clear a picture as possible of the differences between the parties and will know best how to assist them.

Mr Helman, who appeared for the Respondent, submitted to us that the Respondent had grounds for not trusting the Appellant and was for that reason alone entitled to the appointment of a receiver. The authority quoted was *Revill* v. *Revill*, 1969 (1) S.A. 325, but there is nothing therein to indicate that a Court has no discretion in the matter. The decision in that case was that where a decree of judicial separation provides for a division of the joint estate and the wife has good grounds not to trust the husband to make a fair division of the assets almost all of which are in his possession, the wife is entitled to demand the appointment of a receiver. But this must be read in context. The learned judge had quoted, without dissenting in any way therefrom, a passage from *Gillingham* v. *Gillingham*, 1904, T.S. 609, part of which reads "where (the parties) do not agree *the duty devolves upon the Court to divide the estate*, and the Court has the power to appoint some person to effect the division on its behalf . . ." (The italics are mine). There is nothing in this case contrary to the view expressed in the cases of *Gates* and *Opperman, supra*, that a Court can itself effect a division.

It is true that Mr Helman in making his submission was not referring to any choice a Court may have either to effect a distribution itself or to appoint a receiver, but was endeavouring to show that sufficient was before the Court *a quo* to entitle the Respondent to relief. However, a discretion does exist and it is for this reason that as much readily available evidence as possible should be led, so that the Court can decide how best to exercise it. In *Revill's* case a receiver was appointed, but there the order was one for division, which means equal division, so that a determination of the ratio of the contribution of one spouse to that of the other was not necessary, as it would be in the instant case. Another factor which could have led to the appointment of a receiver in *Revill's* case was that the estate was considerable and that the expense involved in such an appointment could be justified. From *Gates supra* it is clear that where the estate is small, as would appear to be the position in the instant case, a Court should endeavour to effect the distribution itself, if possible.

I am of the opinion, that there was insufficient evidence before the Court *a quo* to justify the appointment of a receiver and consequently consider that the appeal should be upheld with costs and the judgment of the Court *a quo* altered to read "Absolution from the instance, with costs.".

Potgieter, President: I concur.

Van Wezel, Permanent Member: I concur.

For Appellant: Mr B. A. S. Smits, Johannesburg.

For Respondent: Mr Henry Helman, Johannesburg.

## NORTH-EASTERN BANTU APPEAL COURT

**MBAMBO vs. BELE**

B.A.C. CASE No. 97 OF 1968

DURBAN: 24 March 1969. Before Yates, President and Craig and Warner, Members.

## CHIEFS' AND HEADMEN'S CIVIL COURTS

## COMMON LAW—SPOLIATION

*Chief's judgment—execution—spoliation order—subject no longer in Respondent's possession.*

*Summary:* Applicant sought a spoliation order in respect of a beast attached and sold by his Chief in execution of a judgment of the latter's Court in a criminal case. The Bantu Affairs Commissioner held that the Chief was not entitled to execute on property to satisfy a fine or order for payment of taxes but should have caused the appearance of the accused person before a Bantu Affairs Commissioner for imposition of an appropriate alternative sentence of imprisonment.

*Held:* That a Chief may attach property in satisfaction of a fine imposed by his Court and that it is only after he has failed to recover the amount by that means that he may arrest the accused person and take him before a Bantu Affairs Commissioner for imposition of an alternative period of imprisonment.

*Held:* That a spoliation order is incompetent when its subject is no longer in the alleged spoliator's possession.

*Cases referred to:*

*Mbambo* v. *Chief Dhlomo,* 1955, N.A.C. 126 (N.E.).

*Mazibuko* v. *Shabalala & Ano.,* 1953, N.A.C. 243 (N.E.).

*Laws referred to:*

Act 38 of 1927.

Proclamation R. 195 of 1967 (Natal Bantu Code).

Government Notice 1099 of 1943.

Proclamation R. 45 of 1961.

*Rules referred to:*

Chiefs' and Headmen's Courts—Rule 8.

*Works referred to:*

Maasdorp, Institutes of S.A. Law, Volume II.

Seymour, Native Law in South Africa.

Appeal from the Court of the Bantu Affairs Commissioner, Umzinto.

Yates (President):—

This is a spoliatory action in which the Applicant (now Respondent on appeal) asked that Respondent (Appellant) be ordered to return to him a red and white cow which he alleged had been taken from his possession unlawfully and by force by a messenger, acting under the instructions of respondent, who is a Chief in the District of Umzinto. He denied that he had failed to pay his taxes or that there was a judgment against him granted by the Chief.

A rule *nisi* was issued calling upon the Chief to show cause why possession of the beast should not be restored to Applicant and on the return day evidence was led.

Thereafter the Order was confirmed with costs and Respondent has appealed on various grounds, the only material one at this stage being the third, which was amended with the consent of this Court and reads as follows:—

"Having found that the Spoliation Order brought before him upon which he was called to adjudicate was as a result of a lawful judgment of the Court and that the matter was brought to him as a matter of first instance by way of the said application, the Bantu Affairs Commissioner erred in proceeding with the matter as he did to its final conclusion and as there was nothing to restore when the Interim Order was issued or the Final Order was confirmed the rule should have been discharged."

The Additional Bantu Affairs Commissioner found as a fact that on 28 April 1968, the Applicant appeared before the Respondent on criminal charges and was convicted of failing to pay his dog tax and tribal levies. He was ordered to pay R8.00 in respect thereof and was further fined R8.00 for failing to pay and also fined R2.25 for failing to tell people to remove Lantana (a noxious weed). On 8 May 1968, the beast in question was attached by tribal policemen and sold on 14th idem for R18.00. The Applicant's fines, tribal levies and dog taxes were paid with his money.

The application for a Spoliatory Order was dated 18 May 1968, and directed against the Chief. However as pointed out by Mr Mofolo the beast was sold four days before the application was made so that at that stage it was no longer in the Chief's possession and it was not competent to order him to return it, vide Maasdorp, Institutes of S.A. Law, Vol II (8th Ed.), p. 23.

The Commissioner, in confirming the Order that the Chief should restore the beast pointed out in his "Reasons for Judgment" that in terms of section 20 (5) of Act 38 of 1927, a Bantu Chief who fails to recover from a person any fine imposed upon him, may arrest such a person or cause him to be arrested by his messengers, and shall within 48 hours after his arrest cause him to be brought before the Bantu Affairs Commissioner in whose area of jurisdiction the trial took place. The Bantu Affairs Commissioner will then act in terms of subsection 5 (b) of section 20. This section does not make provision for the attachment of property.

Section 20 of the Act (*supra*) deals with the powers of Chiefs, headmen and Chiefs' deputies in criminal matters and subsection (2) thereof provides that " . . . the manner of execution of any sentence imposed . . . save in so far as the Minister may prescribe otherwise by regulation (and he has not done so) . . . *shall be in accordance with Bantu law and custom.*

Section 21 of the Natal Code contained in Proclamation R. 195 of 1967 also provides that "a fine imposed by a Chief or headman under the provisions of the Code shall for the purposes of appeal and recovery be regarded as a fine imposed in the exercise of jurisdiction under section 20 of the Act".

Section 8 of the Rules for Chiefs' and Headmen's Civil Courts provides that the procedure in connection with the execution of a Chief's judgment *shall be in accordance with the recognised customs and laws of the tribe* and this clearly envisages attachment for subsection 3 (a) provides the procedure to be adopted when attachment is resisted by force and the Chief's messenger is of the opinion that the seizure cannot be effected without a breach of the peace.

Section 1 of Government Notice 1099 of 1943 provided that if a convicted person failed to pay the fine imposed upon him by a Chief or headman in terms of section 20 of the Act the judgment must be enforced as though it was a civil claim heard in terms of section 12 of the Act. This provision is omitted from the substituting Proclamation R. 45 of 1961 but this does not alter the fact that the manner of enforcing the judgment shall be according to Bantu law and custom.

Bantu law is an established system of immemorial rules which has evolved from the way of life and natural wants of the people. Bantu criminal law deals with wrongs against the Chief in his capacity as "father" as it were of the tribe and he is entitled to exact a fine from the wrongdoer. Vide "Native Law in S.A." (2nd edition) by Seymour at p. 10 and *Mbambo* v. *Chief Dhlomo,* 1955, N.A.C. 126 (N.E.). See also the case of *Mazibuko* v. *Shabalala and Ano.,* 1953, N.A.C. 243 (N.E.) where in a case somewhat similar to the instant one it was accepted that the Chief had the power to attach cattle. In that case, because attachment was resisted, it was held that the Chief should not have used force to recover the fine but should have applied to the Bantu Affairs Commissioner's Court for enforcement of the judgment.

In the instant case the Commissioner found that the fine was properly imposed. This being so the Chief was entitled to attach a beast in settlement when Plaintiff did not pay. The procedure of arrest etc. outlined in section 20 (5) of the Act will only be invoked if the Chief has failed to recover the fine by this means.

The appeal is allowed with costs. The judgment of the Bantu Affairs Commissioner is set aside and for it is substituted "The rule *nisi* is discharged with costs".

Craig and Warner, Members, concurred.

For Appellant: Mr O. K. Mofolo.

For Respondent: In person.

## NORTH-EASTERN BANTU APPEAL COURT

**DORIS KUMALO d.a. SOLOMON KUMALO**

**vs.**

**NEHEMIAH ZUNGU**

B.A.C. CASE 94 OF 1968

PIETERMARITZBURG, 20 January 1969: Before Yates, President and Craig and Addison, Members.

# SEDUCTION AND PREGNANCY BANTU WOMEN IN NATAL LOCUS STANDI

*Seduction—damages—locus standi—Bantu women—Natal.*

*Summary:* The Plaintiff a Bantu woman sued under the common law for damages for seduction and pregnancy after a claim under Bantu law by her guardian had failed. The Bantu Affairs Commissioner upheld a special plea that Plaintiff being a perpetual minor had no locus standi in judicio to claim damages.

*Held:* That Bantu women in Natal have locus standi to sue for damages for seduction and pregnancy.

*Cases referred to:*

*Ex parte Minister of Native Affairs in re Yako* v. *Beyi* 1948 (1) *A.D.* 388.

*Vilapi* v. *Molebatsi* 1951 *N.A.C.* 8 (*C.D.*).

*Works referred to:*

"Principles of Native Law and the Natal Code" by Stafford & Franklin.

"Native Law in South Africa", 2nd Edition, Seymour.

*Legislation referred to:*

Law 49 of 1898 (Natal).

Act 13 of 1954.

Natal Code, Proclamation 195 of 1967.

Appeal from the Court of the Bantu Affairs Commissioner Utrecht.

Yates, President:

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court "for Defendant, each party to pay his own costs" in an action in which Plaintiff duly assisted by her father, sued the Defendant for R100 being damages for seduction and pregnancy and maintenance at the rate of R5.00 per month for the child which was born in February 1966.

Defendant pleaded as follows:—

"1. *Special plea:*

In terms of Native Law a native female is deemed a perpetual minor in Law and has no locus standi in Judicio and has no power to prefer these actions against the Defendant.

Wherefore Defendant prays that Plaintiff's claims be dismissed with costs.

2. *Alternative plea:*

In the event of the Court finding that the Plaintiff has Locus Standi in Judicio and has the power to prefer these claims then the Defendant pleads as follows:—

(i) Defendant denies that he ever had intercourse with Plaintiff as averred or at all and consequently that he did not seduce her and that he is not the father of her child as averred and puts Plaintiff to proof thereof."

At the outset of the case Defendant's attorney asked that the special plea be considered first and the Bantu Affairs Commissioner heard argument in regard thereto. He then upheld the special plea and entered judgment for Defendant.

An appeal has been brought against this jugdment on the grounds that:—

"1.

The learned Bantu Affairs Commissioner erred in ruling that Bantu Law and custom applied and that the Plaintiff had no "locus standi in judicio" in consequence.

2.

The learned Bantu Affairs Commissioner erred in not finding that Plaintiff had a claim at common law and consequently erred in upholding Defendant's special plea."

As pointed out by the Commissioner in his „reasons for judgment" a Bantu woman has locus standi to sue for damages for seduction under common law vide *ex parte* Minister of Native Affairs *in re Yako* v. *Beyi* 1948 (1) 388 A.D.; whereas the Natal Code, now contained in Proc. R. 195 of 1967, vide section 137 (1) read with section 130, gives the woman's father or guardian the right of action against the seducer under Bantu Law. After pointing out that a previous judgment in favour of Plaintiff's father in a Chief's Court for damages for seduction of his daughter had been upset on appeal to the Commissioner's Court he decided to apply Bantu Law and gave as his reasons:—

"a. Bantu Law as enshrined in the Natal Code of Bantu Law, provides an adequate remedy and I consider that in general Bantus in Natal should be restricted to the Code where it adequately provides for the contingency, except possibly where some very special circumstances exist which would make the application of Bantu Law inequitable or unjust.

b. Plaintiff's father has already had resort to Bantu Law and having been unsuccessful, Plaintiff now resorts to another system of law. This I consider inequitable and unjust towards Defendant."

The Natal Code does provide a remedy under Bantu law but as pointed out by Mr Menge, that remedy is only available to the woman's father or guardian and under that system the woman is left with no redress. At page 7 of the "Principles of Native Law and the Natal Code" by Stafford and Franklin the authors state that as long as section 80 of Act 49 of 1898 which provided that "all civil Native cases shall be tried according to Native laws, customs or usages save as far as may be otherwise specially provided by law . . . .", applied the provisions of the Code should be followed wherever Bantu Law provides a remedy and the common law should be invoked when the Plaintiff would otherwise have no redress; and to this extent support the Commissioner's contention. Section 80, however, was repealed by section 21 of Act 13 of 1954 so that there is now no differentiation in this regard between Natal and the remainder of the Republic. Furthermore as stated in *Yako's* case (*supra*) at p. 397 "On the contrary the indications are rather that common law was intended to be applied unless the Native Commissioner in his discretion saw fit in a proper case to apply Native law" and as stated at p. 400 "The discretion is, of course, a judicial one . . .".

As indicated above a woman has *locus standi* to bring an action for damages for seduction and there is no reason why in the instant case Plaintiff should be penalised because her father has lost an action. As stated at pages 256/7 of the 2nd Edition of "Native Law in S.A." by Seymour, in cases such as this the Courts have laid down that if the seducer has paid, or has a judgment against him for damages due to the girl under the law of the land, her father or his heir is estopped from bringing an action under Bantu Law. The converse, however does not apply

for if the seducer has paid a fine or has a judgment against him for the amount of the customary fine due to the girl's father the girl may still bring her action but the value of this fine should be taken into account when assessing damages due to the girl. See also *Vilapi* v. *Molebatsi* 1951 N.A.C. 8 (C.D.).

In the result the appeal is allowed with costs. The judgment of the Bantu Affairs Commissioner is set aside and for it is substituted "Special plea dismissed with costs".

Craig and Addison, Members, concurred.

For Appellant: Adv. W. O. H. Menge i.b. Uys & Boshoff, Vryheid.

For Respondent: Mr A. Geyser (C. C. C. Raulstone & Co.).

## NORTH-EASTERN BANTU APPEAL COURT

**NKABINDE & ORS. vs. SHABALALA**

B.A.C. CASE 10 OF 1969

DURBAN: 26 March 1969. Before Yates, President and Craig and Warner, Members of the Court.

## DEFAULT JUDGMENT

*Default judgment—rescission—wilfulness of default—onus—adequacy of application.*

*Summary:* A Defendant whose employer had transferred him away from his home province was held to be in wilful default and was presumed to have been aware of the default judgment granted against him within two days thereof and was refused rescission even though the Court was aware of his transfer and was unaware of the dates of his departure and return such dates not having been disclosed in his inadequate application for rescission.

*Held:* That the Court erred in presuming wilfulness in the circumstances particularly as the onus of proof of wilfulness rested ultimately on the Plaintiffs.

*Held:* That the Court erred in presuming that Defendant had knowledge of the default judgment within two days of its granting in the light of the disclosure that he had been transferred by his employers and efforts by him and his attorney to get in touch with had failed.

*Cases referred to:*

Those summarised by Warner in his "A Digest of S.A. Native Civil Case Law" at paragraph 426.

*Tanzeni* v. *Tsoke* 1964 B.A.C. 92 (S.D.).

*Mangwanya* v. *Mapupa* 1958 N.A.C. 21 (S.)

*Rules referred to:*

Bantu Appeal Court Rule 2.

Bantu Affairs Commissioners' Courts Rules 77 (1) and (4).

*Works referred to:*

"A Digest of S.A. Native Civil Case Law"—Warner.

"The Civil practice of the Magistrates' Courts of S.A."—Jones & Buckle, Sixth edition.

Appeal from the Court of the Bantu Affairs Commissioner, Pinetown.

Craig, Permanent Member:

There were cross-claims in this case and in the absence of Defendant/Plaintiff in Reconvention judgments in favour of Plaintiffs/Defendants in Reconvention were given against him by default.

A subsequent application by Defendant for rescission of these judgments was refused by the Bantu Affairs Commissioner and Defendant appealed to this Court on the following grounds:—

"1. The Learned Bantu Affairs Commissioner erred in holding that the Applicant had not complied with rule 77 (1).

2. The presiding officer should have satisfied himself when the Applicant returned from Harrismith if he was in doubt of the date of his return.

3. The Learned Bantu Affairs Commissioner erred in holding that the Applicant was wilful in his default when there was insufficient evidence to show wilfulness.

4. On the face of paragraphs 3, 4, 5, 6 and 7 the Learned Bantu Affairs Commissioner erred in holding that rule 77 (4) applied.

Wherefore may it please the Appeal Court to set aside with costs the judgment given on the 30th May, 1968, and grant Rescission of Judgment entered on the 30th May, 1968."

The appeal was noted late but an application for condonation was granted.

Attention is however directed to the fact that a formal application supported by affidavits, all duly stamped must be lodged as required by Bantu Appeal Court Rule No. 14. The judgments summarised by Warner in his "A Digest of S.A. Native Civil Law" at paragraph 426 are apt. Defendant's attorney admitted the futility of seeking to saddle the judicial officer, however blameworthy the latter might be in not adhering to the time limits prescribed by Bantu Appeal Court Rule No. 2, with responsibility for the late noting of an appeal in the light of the decision in *Tauzeni* v. *Tsoki,* 1964, B.A.C. 92 (S.D.).

It is clear from the pleadings and from the unfruitful efforts of Defendant and his attorney to get in touch with one another after the former's transfer to the Orange Free State that he had every intention of pursuing his defence and counter-claim and his debarment from so doing might well result in injustice to him.

The affidavit lodged in support of the application for rescission is pathetically inadequate and gives the impression of having been prepared by someone unversed in litigation. The quality of the application in its entirety is such that the Commissioner would have done well to have followed the eminently correct and sensible suggestion of Mr Bath, who appeared for Plaintiff, that the matter be struck off the roll thus giving Defendant the opportunity to apply afresh in a satisfactory manner.

The Bantu Affairs Commissioner, however, seems to have adopted an intransigent attitude. He found that Defendant's default was wilful despite the latter's reasonable explanation regarding his transfer to the Orange Free Sate. He overlooked the point that the onus of proof of wilfulness rested ultimately on the Respondents to the application i.e. the Plaintiffs (see Jones & Buckle: "The Civil Practice of the Magistrates' Courts of S.A.", 6th Edition at pages 678-679).

Having been made aware of the undisputed fact that Defendant's employers had transferred him to a neighbouring Province the Commissioner should not have jumped to the conclusion that Defendant had not complied with Bantu Affairs Commissioners' Courts Rule 77 (1) and that Rule 77 (4) was applicable as, thanks to the inadequacy of the affidavit, the dates of Defendant's departure to and return from the Orange Free State were unknown to the Court *a quo*. Defendant should not have been debarred from relief because of the negligence of his attorney (*Mangwanya* v. *Mapupa*, 1958, N.AC. 21 (S)—Warner's "Digest" Supplement, paragraph 12).

Due to its inherent inadequacy the application for rescission fell to be struck off the roll and the appeal must succeed.

It is not the fault of the Plaintiffs that matters reached the state that they did in the Bantu Affairs Commissioner's Court and the blame for the fruitlessness of the application for rescission must be laid at the door of Defendant's legal adviser who, it is trusted, will ensure that his client does not suffer financial loss as a result.

In the result the appeal was allowed and the Bantu Affairs Commissioner's judgment was set aside and for it was substituted "The application is struck off the roll, with costs". Appellant to pay the costs of appeal.

Yates, President and Warner, Member concurred.

For Appellant: Mr T. W. Geabashe.

For Respondent: Adv. J. M. S. Bristowe i.b. D. Macrae Bath & Co.

# SOUTHERN BANTU APPEAL COURT

## MORGANTHAL MDOLO vs BOYCE VANDA

### BANTU APPEAL CASE 5/69

KING WILLIAM'S TOWN: 8 September 1969. Before Yates, President; Neethling and Moll, Members.

## DAMAGES

*Quantum of damages for adultery when action brought under Common Law*

*Summary:* Plaintiff sued for and was awarded damages of R200 against Defendant who had committed adultery with his wife.

*Held:* That all the circumstances of the case should be considered and that as a guide the award should bear some relation to the amount recoverable under Bantu Law.

An appeal from the court of the Bantu Affairs Commissioner, Peddie.

Yates (President):—

Good cause having been shown, the late noting of the appeal was condoned.

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court awarding Plaintiff (now Respondent) R200 damages with costs in an action in which he sued the defendant (now applicant) for that amount as damages for adultery.

The appeal is brought on the grounds that it is against the weight of evidence and the probabilities of the case and "that in any event the Bantu Affairs Commissioner erred in awarding damages to the extent of R200 in as much as Plaintiff is not legally entitled to damages in excess of an equivalent of three head of cattle had the Plaintiff been married by customary rites."

In regard to the merits of the case no good reason has been advanced why the evidence of Plaintiff that he caught his wife leaving Defendant's home at about 3.30 a.m. and that she subsequently admitted to him and at a family meeting later that morning that she had committed adultery with Defendant, supported as it is by the evidence of Plaintiff's brother as to the admission and the production of a written confession by Plaintiff's wife signed before a Commissioner of Oaths, should be disbelieved.

In my view the Commissioner was fully justified in finding that adultery had been committed.

On the question of damages this action lies at Common Law and Plaintiff, "whose marriage rights have been violated, is entitled to recover damages. The grounds on which damages are recoverable are, firstly, loss of *consortium*, and, secondly, on the ground of injury or *contumelia* inflicted upon the Plaintiff.

In assessing the damages recoverable under the first head the Court must attempt to estimate as best it can, in terms of money, the actual damage sustained by the Plaintiff in consequence of the loss of the society, comfort and services of the guilty spouse. In assessing the damages recoverable under the second head the Court must be guided by all the circumstances of the case, account being taken, amongst other things, of the terms upon which the spouses lived with one another and the circumstances in which the adultery took place (Viviers *vs* Killian, 1927, A.D. 449). It follows, therefore, that the damages awarded in each case must vary considerably and it is, therefore, wrong to say that the injured spouse is not entitled to recover damages in excess of that allowed him under Native Law. The amount awarded must depend on the circumstances of each case." See Nazo *vs* Lubisi, 1946 N.A.C. (C. & O.) 18.

The general principle was enumerated in Ndodoza v. Tshaniwa, 1939 N.A.C. (T. & N.) 64, that the damages awarded under Common Law should have some relation to the amount recoverable under Bantu Law and this principle is a good one to follow provided it is regarded as a guide and not as a fixed rule, vide cases cited in Mwanda v. Kuse 1962 N.A.C. (S.) 64. If a plaintiff claims an amount in excess of that payable under Bantu Law he must show aggravating or other circumstances which would justify the award of such an amount. See Bukulu v. Cebisa 1946 N.A.C. (C. & O.) 45. In the instant case plaintiff has divorced his wife on account of her misconduct with defendant and has had to employ a woman, to whom he paid R4 a month to look after the children. Not only his children but he too has been deprived of the society, comfort and services of his wife. Both he and defendant occupy responsible positions—he is a teacher and defendant a minister of religion—so that the contumelia inflicted on him would be more severe than that of an ordinary Bantu peasant. Both parties are presumably Fingos as they come from the district of Peddie so that customary damages for adultery not followed by pregnancy would be three head of cattle, vide Bukulu's case *supra*. There is no evidence on record in regard to the value of cattle in that area but it was agreed by the attorneys arguing the appeal that the average value of a beast is accepted at R20.

Taking all the relevant factors into consideration I am of the opinion that an award of R100 as damages in the instant case would be adequate.

The appeal is allowed with costs and the Bantu Affairs Commissioner's judgment altered to read "For plaintiff for R100 with costs".

Neethling and Moll, members, concurred.

*Appearances:*

For Appellant: Mr D. D. Z. Popo.

For Respondent: Mr M. Anderson.

# SOUTHERN BANTU APPEAL COURT

**GLASS NTSINDENI MGIDLANA vs 1. DYUBUKILE SEFA**
**2. BANTWANA SEFA**

B.A.C. CASE 18 OF 1969

UMTATA: 25 August 1969. Before Yates, President and Messrs Adendorff and Jordaan, Members.

## PRACTICE AND PROCEDURE

*Judgment held to be one "by default" even though defendant was present in Court.*

*Summary:* Defendant 1 was present in Court at the hearing of an action for damages. His attorney, however, was unavoidably absent and Defendant indicated that he was unable to proceed in his absence. Judgment was given against him. He applied for a rescission of the default judgment and plaintiff contended that this could not be considered as the judgment was not one given by default. The application was granted and the matter was brought on review on the grounds of irregularity.

*Held:* that although defendant was physically present in court the surrounding circumstances and his behaviour indicated clearly that he was unable to proceed in the absence of his attorney. His withdrawal from the proceedings resulted in a default judgment being given against him.

Appeal from the court of the Bantu Affairs Commissioner, Elliotdale.

Yates (President):—

Plaintiff (now Applicant) sued Defendant 1 (now Respondent) as tortfeasor and Defendant 2 as his kraalhead for payment of five head of cattle or their value R100 and costs being customary damages which he alleged he had suffered as a result of defendant 1 having committed adultery with his wife. A default judgment was granted on 6 October 1965 but by consent it was rescinded on 15 November 1965. Defendants then filed a plea denying the allegations. There were four postponements by consent and on 24 February 1969 plaintiff and his attorney appeared as did Defendant 1. The Bantu Affairs Commissioner noted on the record that Defendants' attorney had phoned him concerning his absence which was occasioned by his attendance at Circuit Court in Umtata. The matter was then set down for 2 p.m. At 2.30 p.m. the hearing was resumed and Defendant 1 informed the court that he did not want to proceed in the absence of his attorney. The case was then postponed to 4 p.m. when defendant 1 informed the court that his attorney was still detained at Circuit Court and that he was unable to obtain the services of another. The case proceeded but defendant 1 refused to put his case before the Court. Plaintiff, his wife and the clerk of the Court gave evidence and in regard to each defendant

stated he had no questions to ask. Judgment was then granted for Plaintiff against both Defendants for five head of cattle or their value R100. Payment to be made jointly and severaly. Defendants to pay the costs.

On 4 March 1969 an application for rescission of the judgment by default was noted and Defendant 1 stated in his affidavit supporting the application that when his attorney did not appear on the day set down for the trial, i.e. 24 February 1969 and when he was told that the case would proceed in his attorney's absence he immediately indicated to the Court that he could not proceed without the assistance of an attorney and applied for a postponement. However, the case proceeded and judgment was given against him. It is clear from the affidavits filed by Defendant's attorney and by the latter's clerk that the Plaintiff, his attorney and the presiding officer were all aware that Defendant's attorney was unavoidably detained in Umtata. In his replying affidavit Plaintiff's attorney stated that as the case was started in 1965 his client insisted that it be proceeded with forthwith. He contended that the judgment was not a default judgment and that Defendant was not entitled to a rescission.

The application was heard on 31 March 1969 and granted. There was no order as to costs.

This matter has now been brought on review on the grounds that "the action of the Bantu Affairs Commissioner is rescinding the judgment entered on 24 February 1969 was grossly irregular and contrary to all Law and precedent because—

(a) the judgment entered was not a default judgment and therefore there could be no 'rescission' thereof. The "rescission" of this judgment in fact amounts to granting of leave for re-trail of the case, a step for which there is no provision;

(b) even in respect of Defendant 2 who was in default the rescission is irregular because no application has been made by him therefor, neither has any affidavit been filed by him or on his behalf in terms of Rule 77 (2) of the Rules of Court;

(c) no notice was ever given to Defendant 2 regarding the application that was heard on 31 March 1969 and the granting of the said application was therefore irregular."

Mr Koyana who appeared for Applicant based his argument on the words of the relevant definition of a default judgment contained in Rule 1 of the Rules for Courts of Bantu Affairs Commissioners contained in Government Notice 2082 of 1967, viz. "Default judgment means a judgment given in the absence of the party against whom it was given" and the fact that the respondent was in Court during the proceedings. He therefore contended that this was not a default judgment and on the face of it this appears to be a perfectly valid argument. I have not been able to find a case exactly on all fours with this one but that of Meer Leather Works Co. *v.* African Sole & Leather Works (Pty) Ltd 1948 (1) S.A. 321 T.P.D. is similar. In that case Defendant's attorney submitted a medical certificate to the effect that his client was too ill to attend Court and requested a postponement which was refused. He then withdrew from the case and judgment was given against his client. In that case Neser, J. on p. 325 stated "when I first read the papers it appeared to me to be somewhat anomalous that a judgment, which had been obtained in the manner in which this one was,

should be described as a default judgment in that the appellant had been represented by an attorney and it did not seem to me that a judgment could be desribed as a default judgment if the attorney decided, because he had not succeeded in an application for postponement, to withdraw from the proceedings. However, on a consideration of the Rules to which I have referred, it seems that Mr Pinshaw is correct in his concession that this was a default judgment. Whatever the reasons may have been for Mr Clur's withdrawal, the judgment is a judgment given in the absence of the party against whom it was given and when I say in the absence of the party I mean in the absence of the party or a representative of such party." There is no indication whether appellant's attorney, Mr Clur, remained in the court or not but in my view that is not important. It is not his physical presence or absence that is important but his mental attitude. The stand he took is identical with that taken by Defendant in the instant case who indicated at the outset that he could not proceed with his case in the absence of his attorney and that he remained constant in this attitude is shown by his reply at the end of the evidence in chief of each of claimant's witnesses that he had no questions to ask. As he was a Bantu and not conversant with court procedure he did not state formaly that he withdrew from the case but this was undoubtedly his intention. Had he actually left the courtroom after registering his protest at the case continuing the judgment would undoubtedly have been one by default. The nature of his stand is also confirmed by the Commissioner's "Reasons for Judgment". In other words although he was physically present he took no voluntary part in the proceedings and the judgment was therefore a default judgment. This view is supported by the following extract from Gane's translation of Voet quoted in the case of Katritsis *v.* De Macedo 1966 (1) S.A. 613 A.D. at p. 618: "Moreover not only is he who does not attend at all on the day fixed to be accounted a dallier and defaulter, but also he who does indeed attend, but does not take in hand the business for the taking in hand of which the day had been appointed. For instance a plaintiff appears and makes no claim; or a defendant does not challenge the Plaintiff's claim when he should do so. *He who thought present makes no defence is surely reckoned in the position of one who is not there;* and he who when called upon does not plead is deemed to have been futile and is expressly classed as contumacious". (The underlining is mine). In that case too the conclusion come to was that a defendant by his withdrawal was in default at the trial. Section 36 of the Magistrates' Courts Act, No. 32 of 1944, which is the same as Rule 76 of the Rules for Bantu Affairs Commissioner's Courts, provides that "the Court may upon application by any person affected thereby (a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted." At p. 114 of Jones & Buckle, 6th Ed. it is stated that "the cases in which, under the present practice, it is possible for judgment to be granted against a person in his absence include (6) where either party, though appearing at the beginning of the trial, *withdraws* or otherwise fails to remain until judgment." (The underlining is mine.) In the instant case Defedant intimated that he could not proceed and the only practical interpretation of his action is that he withdrew from the case.

Mr Koyana also relied on the case of Ngwane *v.* Vakalisa 1959 N.A.C. 64 (S) where Defendant himself was not present and his attorney elected to proceed in his absence. In that case clearly Defendant, who was represented by his attorney, was not in default.

The conclusion I come to then is that at the outset of the hearing Defendant withdraw from the case and therefore the judgment given against him was a default judgment which the Commissioner had every right to rescind if he was satisfied that the requirements therefor had been met. There has been no irregularity and the application to set the rescission judgment aside is refused with costs.

The liability of 2nd Defendant was contingent upon a valid judgment against 1st Defendant, i.e. against the tortfeasor, in that the kraalhead's liability for an inmate's torts is contigent upon the inmate's liability therefor. The default judgment against Defendant 1 having been rescinded it then clearly has no applicability against Defendant 2.

Adendorff and Jordaan, members, concurred.

*Appearances:*

For Appellant: Mr D. Koyana.

For Respondent: M. K. Muggleston.

A. J. Adendorff, Permanent Member, concurred.

D. J. W. Jordaan, Member, concurred.

# NORTH-EASTERN BANTU APPEAL COURT

**MPANZA vs MADIDE**

B.A.C CASE 18 OF 1969

ESHOWE, 8 July 1969. Before Cronjé, President and Graig and Colenbrander, Members of the Court.

## DAMAGES

MESSENGER OF COURT

## PRACTICE AND PROCEDURE

*Messenger of Court—wrongful attachment and delivery of property—damages—judgment more advantageous than asked for—exhibits—best evidence rule—inadequate reasons for judgment.*

*Summary:* A Messenger of Court attached certain ten cattle and despite notification that the cattle were not the property of the execution debtor and his own admitted knowledge that the cattle were in dispute completed execution by delivering them to the execution creditor who in turn sold them to a second party who, in his turn, sold them to a third party for R392. The claimant sued the Messenger for damages based on the value of seven of those ten head and was awarded the full value of the ten head.

*Held:* That the Messenger of Court acted wrongfully in completing an execution when he knew the ownership of the attached property was in dispute and should have instituted interpleader proceedings.

*Held:* That when documents are available they must be produced and admitted as exhibits to the exclusion of secondary evidence as to their contents in compliance with the best evidence rule.

*Held:* That a party may not be awarded more than he has asked for.

*Held:* That judical officers must comply with the requirements of Bantu Appeal Court Rule 9 in the preparation of their "Reasons for judgment".

Appeal from the Court of the Bantu Affairs Commissioner Hlabisa at Mtubatuba.

*Cases referred to:*

Butelezi vs. Mpanza 1939 N.A.C. (N. & T.) 134.

Ngcobo vs. Mapumulo 1924 N.H.C. 47 (Warner 2673).

Hlongwane vs. Hlongwane 1947 N.A.C. (N. & T.) 111.

Ugwabu vs. Masoye 1916 N.H.C. 224.

Ndhlovu vs. Ndhlovu 1954 N.A.C. (N.E.) 59.

Vundla vs. Vundla 1958 N.A.C. (N.E.) 11.

*Rules referred to:*

Bantu Appeal Court Rules 9 and 10.
Bantu Affairs Commissioner's Courts Rules 68, 73.

*Laws referred to:*

Bantu Administration Act 38 of 1927.

*Craig, Permanent Member:*

Plaintiff (now Respondent) sued Defendant (now Appellant), a Court Messenger, in the Court a quo for R546 as damages arising from the "wrongful and unlawful" attachment and delivery to the execution creditor of certain seven head of cattle and was awarded judgment in an amount of R392, with costs.

An appeal to this court was noted by the defendant on the following grounds:—

"1. That the judgment is against the evidence and the weight of evidence, and bad in Law.

2. That, as the attachment was neither wrongful nor unlawful, but in fact, pursuant to a lawful writ of execution, as admitted in the Plaintiff's summons, the Court should have held that the Plaintiff had failed to prove any negligence or malice on the part of the Defendant."

Plaintiff's claim is based on the following allegations which appear in his summons:

"4. On or about 25 January 1968 Defendant, pursuant to a warrant of Execution issued at Mtunzini Bantu Commissioner's Court, Case 40/1962 between Mhlupheni Gumede as Plaintiff and Qendeni Gumede and Zephaniah Manqele as Defendant's attached and removed from on Zephaniah Manqele 10 head of cattle, seven of which were the property of and owned by plaintiff; and

6. The value of such attached cattle amounts to R546 and Plaintiff has suffered damages in this amount by virtue of Defendant's wrongful and unlawful action."

There seems to be no virtue in the allegation that Defendant acted unlawfully in this matter as he was armed with a valid writ but the summons sets out clearly the respects in which the Defendant is alleged to have acted wrongfully.

Defendant proceeded to the kraal of execution debtor Manqele and there informed the latter's wife Lucy that he had come to attach 10 head of cattle. There is unrefuted evidence on record that Defendant was informed by Lucy in the presence of one Hambemevane Butelezi (an apparently disinterested person) who corroborated her testimony, that the cattle at the kraal were not the property of debtor Manqele but that they belonged to Mpanza, presumably present Plaintiff. In his testimony, when questioned by the Court, Defendant admitted that "I knew these cattle were in dispute". He made no attachment that day but first went to consult the kraalhead (co-execution debtor). It is not clear what occurred when the two met as there are conflicting statements thereanent.

Thereafter, on 25 January 1968, Defendant and the execution creditor proceeded to the Gunjaneni area and the former attached 10 head of cattle appertaining to judgment debtor's kraal and immediately delivered them to the former thus completing the execution and this he did despite the admitted fact, inter alia, that the cattle were registered in Lucy's name.

Mr Gardner has argued that as Defendant was armed with a legal writ and executed it as directed by the execution creditor he was released from liability. The writ required him to raise the judgment debt "of the property" of the judgment debtor and it is presumed that he was satisfied that the cattle were the property of that person.

In my view his satisfaction was ill founded. He admitted he knew "that these cattle were in dispute"; he did not deny that Lucy had told him that the cattle were not judgment debtor's; he knew that the cattle were registered in Lucy's name and in this atmosphere of uncertainty he proceeded beyond mere attachment at his own peril. He appeared to have relied too on the presumption that all cattle at a kraal are the property of the kraalhead—in this case, Zephania or, apparently more correctly, Zibizendhlela Manqele. True enough, there is such a presumption but it is rebuttable one see Butelezi vs. Mpanza, 1939, N.A.C. (N. & T..) 134. The facts outlined above should have shaken Defendant's faith in the invoilability of the presumption.

His duty was clear vide Bantu Affairs Commissioners Courts' Rules 68 and 73 and in his own interests it should have been clear to him that the proper means to be utilised in the circumstances was an interpleader action. He chose to usurp the functions of a court of law in deciding the question of the disputed ownership and so acted wrongfully and negligently [Ngcobo vs. Mapumulo, 1924, N.H.C. 47 (Warner 2673)] and has no one to blame but himself for the calamity which has befallen him.

The Bantu Affairs Commissioner did not state in his "Facts Found Proved and Reasons for Judgment" that he found it to be a proven fact that the seven cattle concerned were the property of the Claimant. This he should have done as such proof is a basic essential but it will be presumed that he found ownership to have been established.

Claimant's statement that he was the owner of the cattle was corroborated by execution debtor and his wife Lucy [Hlongwane vs. Hlongwane, 1947, N.A.C. (N. & T.) 111]. The fact that no legal "ukusisa" contract could be intered into with Lucy, a perpetual minor under Bantu Law [Ugwabu vs. Masoye 1916 N.H.C. 224 and Ndhlovu vs. Ndhlovu, 1954, N.A.C. (N.E.) 59], does not necessarily militate against the establishment of ownership.

Lucy testified and was cross-examined in regard to certain summonses apparently issued after execution and Defendant testified regarding them in both his examination in chief and cross-examination. These summonses were not put in as exhibits and it appears strange that this should be so and that evidence regarding them should have been admitted in apparent defiance of the best evidence rule.

However, in the light of my remarks supra I was and am of the opinion that the Commissioner was correct in giving judgment against Defendant.

The Court felt constrained though with great reluctance as the point should have been taken by way of appeal, to invoke its powers under section 15 of Act 38 of 1927 and to raise, mero motu, the question of the correctness of the quantum of the award. It appeared that Defendant suffered an injustice.

The Bantu Affairs Commissioner was asked in a separate communication to justify his award of R392 as damages. He apparently regarded this request as temerarious and retorted that he knew of no machinery which compelled him to furnish justification except "Rule 10 which I have complied with". Unfortunately he did not explain the nexus betweeen Bantu Appeal Court Rule 10 and the justification of a judgment. He relented somewhat, however, and "out of respect" stated "my award of R392 was made because I believed, and still do, that that was the fair and reasonable market price of the cattle". This explanation does not meet the requirements of Bantu Appeal Court Rule 9.

According to Elijah Matonsi who was called as a witness by the Commissioner, the 10 head of cattle attached by Defendant and handed to the execution creditor Mhlupeni Gumede were purchased by him from the latter for R300 and subsequently sold to the Durban Abattoir for R392. Details regarding the price of each beast one of which was a suckling calf, were not canvassed. This amount of R392 figured as the award against Defendant.

It appeared to have escaped the Commissioner's notice that Plaintiff sued for the value of only seven of those ten head of cattle so that, on average, the amount should have been no more than R274.40 i.e. seven-tenths of R392. A successful party cannot obtain a more advantageous judgment than he asks for vide Vundla vs. Vundla 1958 N.A.C. 11 (N.E.). There is nothing on record which could justify a belief that those seven cattle were worth R392. In his summons Plaintiff valued them at R546 and in evidence he valued six of them at a total of R352 and was unable to state the value of the suckling calf. It is reasonably certain that it was not worth the difference between R546 and R352 viz. R194. Obviously Plaintiff's valuations were the result of guesswork.

The interests of justice required a reduction of the award and as it resulted from a point taken by this Court it could not affect costs of appeal.

The appeal is dismissed with costs but the Bantu Affairs Commissioner's judgment is altered to read "For Plaintiff for R274.40, with costs".

Cronjé, President and Colenbrander, Member, concurred.

For Appellant: Mr D. C. Gardner (Wynne & Wynne, Eshowe).

For Respondent: Mr S. H. Brien.

# SOUTHERN BANTU APPEAL COURT

**NTONGA DLATU vs 1. LINDELO NTLA**
**2. TOSE NTLA**

B.A.C. CASE 20 OF 1969

UMTATA: 29 August 1969. Before Yates, President and Adendorff and Muir, Members.

## EVIDENCE

*Claim for damages for seduction and pregnancy—sufficiency of corroborative evidence.*

*Summary:* This is an action for damages for adultery, the evidence for Plaintiff was not strong but established a *prima facie* case: Defendant 1 denied being responsible and denied having written two letters to Plaintiff's daughter.

*Held:* That although it was established that Defendant did write the letters, the contents thereof did not relate to the time, place or circumstances of any alleged seduction; did not incriminate Defendant in any way and were nat necessarily inconsistent with his innocence and therefore his false denial that he wrote them could not be considered as corroboration or Plaintiff's case.

Appeal from the Court of the Bantu Affairs Commissioner, Willowvale.

Yates, President:

This is an appeal from the judgment of a Bantu Affairs Commissioner granting absolution from the instance with no order as to costs in a case in which Plaintiff (now Appellant) sued Defendant 1 as tortfeasor and Defendant 2 as his kraalhead (both now respondents) alleging that Defendant 1 (heireinafter referred to as Defendant) had seduced and rendered his ward Zanele pregnant. Defendant denied the allegation.

An appeal has been brought against the judgment on the grounds that—

"(1) the Court erred in entering a judgment of absolution from the instance since the probabilities favoured the Plaintiff. A judgment for the Plaintiff with costs should have been entered;

(2) the Court should have found that the letters produced by the Plaintiff's daughter, Zanele, were written by or on the authority of the Defendant 1, and established that Defendant 1 was in fact in love with Zanele at the time the latter fell pregnant;

(3) the Court placed undue weight on the discrepancies in Plaintiff's evidence and ignored the contradictions in Defendants' case when the latter actually strengthened the Plaintiff's case."

Plaintiff's daughter, Zanele, stated that not long after Defendant had returned from work she became pregnant by him and gave birth to a child in October 1967. Defendant, who admitted that he was at home when she probably conceived returned to work in February 1967. She stated that shortly thereafter she received two letters from Defendant which she produced. Her pregnancy was discovered in May of that year and taken to the kraal of second Defendant and the matter was then taken to the sub-headman and then the headman.

Zanele's sister Nontsikelelo confirmed that defendant had visited Zanele and had slept with her on several occasions.

As stressed by Mr Berrange Plantiff's case was based on a minimum of oral evidence and further in view of Defendant's denial on oath that he had seduced Zanele some corroborative evidence was required.

The Commissioner in his "reasons for judgment" held correctly that Zanele's failure to report her pregnancy must to some extent weigh against Plaintiff's case. See the numerous cases cited in Warner's "Digest of S.A. Native Civil Case Law" at paragraphs 4512-4519. Mr Muggleston suggested that as Zanele and her parents were churchgoing people they were not likely to pay much heed to custom but they lived in a Bantu rural location where custom should be known. Zanele's excuse for not reporting was that she was afraid but she gave no reason why she should fear her parents' reaction.

The Commissioner also commented on the fact that Plaintiff testified to taking a certain Nomsisi to the sub-headman's kraal as a witness. As pointed out by Mr Muggleston the failure to produce her at the headman's kraal may well be due to the fact that the letters alleged to have been written by Defendant were accepted there as sufficient evidence. The failure to call her in the instant case is not necessarily adverse to plaintiff in the absence of evidence that she was available and that her evidence would be relevant. It is, however, noteworthy that Plaintiff's daughter, Montsikelelo, who went neither to the sub-headman or the headman's enquiries should now have been called to give evidence when her name had not previously been mentioned as a possible witness.

The evidence given by Nontsikelelo was simply to the effect that she had seen defendant visiting and sleeping with her sister, yet she was unable to remember what season it was when she last saw defendant in 1967. She volunteered the information that it was on a Friday and also knew that he came home in autumn, which, as pointed out below is unlikely. She stated further that she did not know that one Tutuzelo had previously been Zanele's metsha whereas Zanele had said in her evidence that she did know. The Commissioner who had the advantage of seeing and hearing her give evidence came to the conclusion that she was a vague and unconvincing witness who was not talking the truth and this Court has not been persuaded that his impression was wrong.

Another aspect of the case considered by the Commissioner was Defendant's statement that he married during his leave in November 1966 and whilst it is undoubtedly unlikely that Defendant would have been carrying on an illicit love affair with Zanele at the same time it is by no means impossible that he would have done so.

A further serious criticism of the evidence given by Zanele and her sister is that both girls who had progressed to Std. IV at school stated that Defendant returned home from work in March 1966, i.e. autumn, whereas defendant's evidence that he only returned on leave in September is borne out by the entries in his reference book which indicate that he was employed at work from 1964 to September 1966. Although the entries are inadmissible as evidence *vide* Scoble's Law of Evidence (third Ed.) at pages 276/7 the reference book was produced in Court without demur by Plaintiff's attorney. Mr Muggleston's argument that this error was possibly attributable to poor memory or mistake by both girls is not a very convincing one in the circumstances.

The case for Plaintiff is, as pointed out above, not particularly strong but Mr Muggleston argued that if it could be shown that defendant was responsible for the letters produced, then, in view of his denial that he even knew Zanele, this would brand him as a liar, and his evidence would then be entirely unacceptable. He pointed out that although the letters were not in Defendant's handwriting he may well have got someone to write them for him and this is possible bearing in mind that defendant had only passeed Std. I at school. He contended that it was most unlikely that the letters would have been fabricated and pointed out that the postmark on the envelopes indicated that the letters had been despatched from Kragbron which is almost certainly the post office for Taaibosch Power Station where Defendant was employed. It was also unlikely that anyone attempting to fabricate evidence would have sent two letters written in different handwriting and with the writer's name spelled differently as in this case, i.e. "Andason Ntla" and "Anderson Ntla". It is significant too that the summons was issued against Lindelo Ntla and not "Anderson" which was the name known to the alleged forger. The contents of the letters were, as pointed out by the Commissioner, peculiarly within the knowledge of defendant and although it is not impossible it is distinctly improbable that they would have been known to anyone other than defendant. No suggestion was made during the hearing of the case that the letters had been forged but if they were then the only person likely to have done so was Zanele or someone acting on her behalf and if that was so it is difficult to understand why the contents of the letters were not more compromising. In this regard Zanele stated in her evidence in chief that when she missed her periods she informed Defendant of this before he returned to work but under cross-examination, when it was put to her that the letters she alleged she had received from defendant made no mention of her condition, she denied that she had told him. It it also difficult to believe that if they had been forged the person responsible would have been able to prepare them and have them despatched from Kragbron as early as 6 March 1967, as indicated by the date stamp on the envelope, when Defendant only left home in February.

The probabilities are overwhelming that despite his denial Defendant did cause these two letters to be written and he therefore did know Zanele well enough to communicate with her.

The position here is that Plaintiff has established a *prima facie* case although the evidence is not particularly strong and the Commissioner, with some justification, has held that the corroborating evidence of Nontsikelelo is insufficient to clinch Plaintiff's case in view of Defendant's denial of responsibility on oath. This Court is now asked to hold that Defendant's denial that he knew Zanele or that he was responsible for the two letters addressed to her is sufficient to weigh the scale in Plaintiff's favour. However, the denial does not relate to the time, place or circumstances of any alleged seduction nor is it necessarily inconsistent with the Defendant's innocence neither do the contents of the letters incriminate him in any way. If, as stated by Zanele, he knew of her pregnancy before he left then surely he would have mentioned it. Defendant clearly realised that should his association with Zanele become known then the case against him would be so much stronger and he was prepared to deny a fact which he feared might be used against him. This shows that his evidence is not entitled to much confidence; but it does not go beyond that, see Kleinwort v. Kleinwort, 1927 A.D. 123.

The Commissioner has obviously given this case considerable thought as is shown by his detailed "reasons for judgment" and this Court has not been persuaded that he was wrong in holding that Plaintiff had failed to discharge the onus on him. The appeal is dismissed with costs.

*Appearances:*

For Appellant: Mr K. Muggleston.

For Respondents: Mr T. Berrange.

Adendorff and Muir, members concurred.

# SOUTHERN BANTU APPEAL COURT

**GILBERT NGUNUZA vs MEYILE NOMNGANGA**

B.A.C. CASE 27 OF 1969

UMTATA: 4 November 1969. Before Yates, President and Messrs Adendorff and Jordaan, Members

## BANTU LAW AND CUSTOM

*Isondhlo—desertion of wife—husband's liability for maintenance of children*

*Summary:* The Plaintiff appealed to this Court against the judgment of a Bantu Affairs Commissioner's Court for Defendant with costs in an action in which the latter was sued for payment of "isondhlo" for five children together with an order for Defendant to take the children of his wife into his custody.

The Commissioner found that where Defendant's wife deserted him he was not compelled to pay maintenance for the children in her guardian's custody.

*Held:* That the claim for "sondhlo" must fail.

*Cases referred to: Skaki* vs *Mpahla and Mpungana* 3 N.A.C. 157.

*Works referred to:* "Native Law in South Africa" by Seymour (2nd Ed.) p. 161.

Appeal from the Court of the Bantu Affairs Commissioner, Kentani.

Adendorff (Permanent Member):—

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Defendant (now Respondent) with costs in an action in which Plaintiff (now Appellant) sued him for payment of "isondhlo" for five children (i.e. five head of cattle or their value R200) together with an order for Defendant to take the children of his wife into his custody within 14 days. In his particulars of claim Plaintiff alleged that Defendant was the lawful guardian of the six surviving children by his wife Sophie, alias Vuyiswa, viz. Liti, Tobeka, Swahili, Zandisile, Mxolisi and Lindile.

Defendant in his plea admitted that Sophie, alias Vuyiswa, bore him six children of whom five are still alive as Swahili had died recently. He, however, denied that he made an arrangement with Plaintiff for their maintenance. He averred that Sophie deserted him and contended that as he had attempted to obtain custody of the children which Plaintiff refused to hand to him, no "sondhlo" was payable. He further asserted that Plaintiff was now bound by his former refusal to give him custody of these children and could not now compel him to relieve him of their custody or pay "sondhlo" in respect of them.

An appeal has been noted on the following grounds:

"1. That the judgment of the Court is bad in law *inter alia* in that it is inequitable to compel the Plaintiff to continue to support and maintain Defendant's children while the Defendant is absolved from carrying the lawful burden of all fathers.

2. That on a balance of probability Plaintiff had disproved Defendant's plea that he cannot compel Defendant to relieve him of the custody of Defendant's children."

It is clear from the evidence that Defendant was the natural father of only the first three children of his wife Vuyiswa, of whom two had died. It is common cause that she deserted him and returned to her maiden kraal in company with her one surviving child. On account of her illness her father took her to East London for treatment without Defendant's consent. She evidently stayed on there where she picked up the other illegitimate children, whom she delivered into Plaintiff's custody. It is also common cause that the dowry paid for Vuyiswa has not been returned to Defendant, so that in law the children born to his wife are all his children.

Plaintiff stated that Defendant came to ask for the children in 1957 but although Defendant did not speak about "sondhlo" he (Plaintiff) asked for it but got no reply. According to Defendant he had putumaed his wife on many occasions unsuccessfully during the lifetime of her father Nete and subsequent to his death also approached Plaintiff for the return of his wife and children but without avail. He testified that he obtained judgment against Plaintiff for the lobolo he had received as dowry for his daughter Tobeka on the ground that there still existed a customary union between him and Vuyiswa. This impelled Plaintiff to sue Defendant for "sondhlo" for the remaining three adulterine children of his sister, all boys, in order that he should be relieved of the maintenance burden resting on him and also to avoid in due course his assistance in the payment of their lobolo.

As pointed out by the Bantu Affairs Commissioner the Defendant in these circumstances was not compelled to pay maintenance, see Skaki *vs.* Mpahla and Mpungana 3 N.A.C. 157. The legal point has also been clearly set out at page 161 of Native Law in South Africa by Seymour (2nd Ed.), viz. "Where a wife has deserted her husband, taking her children with her, or having borne children while so deserting, the person with whom she is staying, whether or not he is staying, whether or not he is her guardian, has no claim for *isondlo* for the children unless her husband has agreed to pay it, or unless he was requested to take back his wife and her children and neglected or refused to do so." In the instant case Defendant has stated that he was always prepared and still is to accept his wife and children and to maintain them should they return to him. At no stage did Defendant agree to pay maintenance nor has it been disputed that Vuyiswa deserted him. A claim at this stage for "sondhlo" by Plaintiff must therefore fail.

Plaintiff would be well advised to return Defendant's wife and children to him instead of the Court ordering him to receive them and thereafter await his (Defendant's) reaction to their return to him.

The appeal is dismissed with costs.

Yates and Jordaan, members, concurred.

*Appearances:*

For Appellant: Mr T. Berrange.

For Respondent: Mr N. L. Smailes.

E. J. H. Yates, President, concurred.

D. J. M. Jordaan, Member, concurred.

# NORTH-EASTERN BANTU APPEAL COURT

## KUMALO vs NTSHANGASE

B.A.C. CASE 30/69

ESHOWE, 9 July 1969. Before Cronjé, President and Craig and Colenbrander, Members.

## EVIDENCE

### PRACTICE AND PROCEDURE

*Sale—motor vehicle—body—engine—parts—definitions—expert evidence—terms of agreement—judgment thereon—assistance to unrepresented parties—reasons for judgment—language medium—naming of witnesses.*

No useful purpose would be served by preparing a lengthy summary and the reader is referred to the full text of the judgment below.

*Works referred to:*

"A Digest of S.A. Native Civil Case Law" by Warner.

Appeal from the Court of the Bantu Affairs Commissioner, Nongoma.

Craig, Permanent Member:—

Plaintiff (now Respondent) sued Defendant (now Appellant) in the Court below on a cause of action regarding a certain Chevrolet van. He prayed for "judgment in his favour for R100 failing which the return of the pick-up van and forfeiture of the R40 paid with costs.

The Bantu Affairs Commissioner gave judgment of "For Plaintiff as prayed with costs", and Defendant has appealed to this Court on the following grounds (the original two grounds were amplified with the leave of this Court by the addition of two further grounds):

"1. The Presiding Officer erred in his finding that I bought the whole Chevrolet Van instead of finding that I bought only the body and parts excluding the engine.

2. The Presiding Officer should have found that the purchase and sale agreement had been finalised as regards the sale of the body and other parts and that I had nothing to do with the engine.

3. The Presiding Officer erred in recording and/or attaching any weight to the evidence of the Plaintiff's witness Makhomazana Nhleko in view of the fact that all such evidence is hearsay.

4. The Presiding Officer erred in finding that the evidence sufficiently established that the Defendant had purchased a complete motor vehicle including the engine for the sum of R140 and not only a portion of such vehicle for the sum of R40 which had been duly paid."

It is common cause that there was an agreement of sale between the parties in respect of a certain 1961 Chevrolet Piek-up Van but a dispute arose as to whether Defendant had purchased the whole van as it stood or only the body exclusive of the engine. Plaintiff averred that Defendant had bought the whole vehicle for R140 and had paid R40 on account while Defendant stated that he had bought the body and parts only and had paid R40 in full settlement of his indebtedness.

At the outset there was no clarity on what constituted the body and what constituted the engine. There were varying opinions by unqualified persons. The Commissioner, unwisely, introduced his own opinion which was in conflict with the others. He was not entitled to take judicial notice of his purported knowledge of exactly what comprises an engine of a motor vehicle. It was not readily discernible from the evidence exactly what parts Defendant had agreed to purchase. Furthermore, there was nothing on record to indicate that there was anything in the agreement between the parties which gave Plaintiff the right to sue, in the alternative, for return of the van and forfeiture of the R40. The Commissioner's judgment which embraced an award on this "alternative claim" was clearly incorrect.

The only claim open to Plaintiff *ex facie* the record was for R100 being, allegedly, balance of purchase price of the vehicle.

Plaintiff brought no evidence to corroborate his version of the transaction. The testimony of Makhosazana was based on hearsay and was valueless. Herbert Zulu, who might have been able to throw some light on the subject was not called.

Defendant's testimony was inconclusive as he stated that he bought the body and "parts of the engine" but did not specify what parts. He sought to define "body" and "engine" but his efforts were unconvincing. He sought without avail to obtain an admission from Plaintiff that the latter had sold the engine to one Magagula. The latter stated he had agreed to buy the engine from Plaintiff and, presumably, the latter could have held him to that admission had he (Plaintiff) not denied such sale. The point of whether or not Magagula would persist with the purchase of the engine with certain apparently vital parts missing was not canvassed.

One Sithole said he remembered the discussion about the motor car and that Plaintiff said he was selling it for R100 and that Magagula was buying the engine for R60 and that Defendant said he was buying the body for R40. Defendant testified that Sithole was present when the sale was concluded but Plaintiff denied that any witnesses were present. Plaintiff did not canvass this point by way of cross-examination of either Defendant or Sithole.

Dosi Magwaza's evidence was in respect only of the purchase by Defendant of the body at R40. His testimony suggests that he was present at all the discussions regarding this matter and it seems strange that he made no mention of who were present and of Magagula's alleged part in the matter.

A perusal of this record leaves one with the feeling that the presiding judicial officer could have done a great deal more to assist these unrepresented parties to present their cases clearly. Lack of canvassing left several points unresolved. See Warner's "Digest" at paras. 4207-4208.

The Commissioner stated that he accepted Plaintiff's evidence and rejected that of Defendant. He should have given his reasons for doing so—see Warner's "A Digest of S.A. Native Civil Case Law" at paragraph 472.

It is the view of this Court that the evidence as a whole was inadequate to found a final and definitive judgment and that absolution would be more equitable. Accordingly the appeal succeeds with costs and the Commissioner's judgment is altered.

This Court has reservations regarding the right of the Commissioner to conduct this case in the vernacular. Various questions arise. Is he a qualified interpreter? Did he announce in Court his interpretation of what he recorded in the one official language? This Court doubts the propriety of the procedure adopted by him.

He must name the witness who gives evidence. It is irregular to record "Plaintiff sworn in Zulu states:" and "Defendant wishes to give evidence and sworn states:". He would be well advised to follow the procedure which has stood the test of years rather than introduce some untried new vogue of his own invention.

In the event, the appeal is allowed with costs and the Bantu Affairs Commissioner's judgment is altered to one absolving the Defendant from the instance with costs.

Cronjé, President and Colenbrander, Member, concurred.

For Appellant: Mr W. E. White.

For Respondent: In person.

# NORTH-EASTERN BANTU APPEAL COURT

## LATHA vs LATHA AND ANO

B.A.C. CASE 36/69

PIETERMARITZBURG, 17 September 1969. Before Cronjé, President, and Craig and Reibeling, Members.

## PRACTICE AND PROCEDURE

*Chiefs' Courts judgment—delivery of "written record"—time limit—registration of—no time limit—Chiefs' courts proceedings—no provision for review—judgments may only be assailed by way of appeal—criminal matters—Bantu Appeal Court lacks jurisdiction*

*Summary:* Applicant sought the setting aside of a Chief's judgments in a criminal and a civil matter by way of application supported by affidavits. Answering affidavits were lodged by the respondents.

*Held:* That this method of assailing Chiefs' courts civil judgments is incompetent and the only method available is by way of appeal.

*Held:* There is no provision in the rules for review of a Chief's court judgment.

*Held:* The Bantu Appeal Court has no jurisdiction in criminal matters.

*Held:* The time within which a chief's court's written record must be delivered to the Bantu Affairs Commissioner to prevent the judgment lapsing is limited.

*Held:* No time limit is prescribed within which a Chief's court's judgment must be registered.

*Cases referred to:*

*Mahlangu vs Motshweni* 1955 N.A.C. (N.E.) 155.

*Bhulose vs Bhulose* 1947 N.A.C. (N. & T.) 5.

*Makoba vs Xulu* 162 N.A.C. (N.E.) 91.

*Rules referred to:*

Chiefs' & Headmen's Civil Courts—Rules 2 (1), 6 (3) & (4), 7 (2).

*Laws referred to:*

Bantu Administration Act, No. 38 of 1927.

Appeal from the Court of the Bantu Affairs Commissioner, Pietermaritzburg.

Craig, Permanent Member:

The Applicant (now Appellant) instituted action against the Respondents by way of application supported by affidavits for the setting aside of "the Chief's (i.e. second Respondent) judgment" as null and void. Shortly, applicant's assertions which

are supported by the affidavit of one Alfred Nxumalo are that on 24 February 1968, he was fined R40 by second Respondent for an alleged offence involving a firearm and that at no stage was he told of a claim for damages against him by first Respondent. In addition he denied that the alleged case for damages was postponed from 24 February 1968, to 30 March 1968.

In an answering affidavit the first Respondent averred that he instituted action for damages for assault against Applicant in second Respondent's Court and that after several failures to attend Applicant finally attended the Court on 24 February 1968, when a criminal charge against him was disposed of and he was informed that the damages case was postponed to the following Saturday. Continuing, it was averred that applicant failed to appear on the following Saturday and thereafter, despite several notifications to appear and several adjournments to permit him to appear he failed to put in an appearance and on 30 March 1968, judgment was given against him in his absence. These averments were, in the main, confirmed by the affidavit of second Respondent who further averred that his written record of this case "is filed of record in this Court".

No oral evidence was led and after hearing argument the Bantu Affairs Commissioner, on 8 May 1969, gave judgment of "Application is dismissed with costs".

An appeal against that judgment was noted on the following grounds:

"1. The learned Presiding Officer erred in ruling that there was a judgment given on 30 March 1968, when on the papers no such judgment was given in favour of the Plaintiff.

2. Assuming that a judgment was given on 30 March 1968, the Learned Presiding Officer should have held that such judgment was by default and because no proof of the compliance with Rule 2 (1) of the Chief's and Headmen's Cilvil Court Rules published in *Regulation Gazette* 885 on 29 December 1967, should have declared such judgment null and void.

3. The Learned Presiding Officer should have found that the purported registration of the judgment on 21 May 1968, was invalid as being out of time.

4. The Learned Presiding Officer erred in declaring that the Applicant/Defendant misconstrued his remedy in making the application to set aside the registration of the judgment.

5. According to the papers before Court the Chief imposed a fine of R50 and the Learned Presiding Officer erred in failing to rule that the fine was incompetent because—

(a) it exceeds the jurisdiction of the Chief's Courts;

(b) the Chief exercised a Criminal jurisdiction while sitting as a Civil Court;

(c) There was no offence committed."

It appears to me that this litigation was ineptly conceived and inadequately presented. There is no authority either in the Bantu Administration Act of 1927 (Act 38 of 1927) or in the Rules for Chief's and Headmen's Courts for this method

of attacking a judgment of a Chief's court and a dissatisfied litigant's only recourse is an appeal to the Bantu Affairs Commissioner's Court (Mahlangu vs Motshweni 1955 N.A.C. 155 N.E.). Incidentally, a Bantu Affairs Commissioner is not empowered to review the judgment of a Chief's Court; the procedure should be by way of appeal (Bhulose vs. Bhulose, 1947 N.A.C. (N. & T.) 5. For these reasons alone I hold the instant proceedings to be incompetent, this point having been raised *mero motu* by the Court, and that this court cannot interfere with the Bantu Affairs Commissioner's judgment.

I propose to proceed further, however, in support of my charge of inadequacy and in order to level other criticisms of the papers placed before the Bantu Affairs Commissioner.

The onus was on the applicant to place everything germane to the issue before the court *a quo*. He produced no documentary evidence of the judgment he attacked, in contravention of the best evidence rule. He did not even bother to say what the terms of the judgment were. According to his affidavit (1) no judgment was ever given against him and (2) the case was registered on 21 May 1968, when the judgment had, in fact, lapsed. These mutually destructive statements launched this matter into the realms of fantasy.

I propose to deal shortly with Applicant's grounds of appeal. Having regard to my remarks in the previous paragraph there is no substance in the first ground of appeal as it seems, on the papers, that there was a judgment "in favour of Plaintiff (sic)–presumably this should read "in favour of first Respondent".

On the papers there was little or no prospect of success on Ground 2. While Applicant and his witness stated that no notification was given on 24 February 1968, of the case for damages and both Respondents state that it was, there was no refutation of first Respondent's assertion that Applicant was, thereafter, notified of the various further adjournments. Regarding Ground 3 no time limit is prescribed for the *registration* of Chiefs' judgments. Chiefs' Courts Rule 7 (2) provides that "if after two months the written record has not been *delivered* to the Bantu Affairs Commissioner as provided in Rule 6 (3) or (4) the judgment shall lapse". As the judgment of 30 March 1968 was registered on 21 May 1968 it is obvious that the written record was delivered within the prescribed time. Regarding Ground 4 and in the light of remarks made supra I am of opinion that Plaintiff did, in fact, misconstrue his remedy. Ground 5 will not be considered as this Court has no jurisdiction in respect of criminal matters—Makoba vs. Xulu, 1962, N.A.C. 91 (N.E.).

The appeal is dismissed with costs.

Cronjé, President, and Reibeling, Member, concurred.

For Appellant: Adv. J. N. S. Bristowe i.b. R. A. V. Ngcobo.

For Respondent: Mr A. J. Gumede (D. S. Maharaj & Co.)

# NORTH-EASTERN BANTU APPEAL COURT

**KUMALO vs MBATA**

B.A.C CASE 39 OF 1969

ESHOWE, 30 September 1969. Before Cronjé, President and Craig and Potgieter, Members of the Court.

## PRACTICE AND PROCEDURE

*Chief's Courts—system of law—form of judgment where appeal successful—costs—hearing of case de novo—query.*

*Summary:* A Chief's Court awarded the Plaintiff five head of cattle and costs. On appeal the Bantu Affairs Commissioner dismissed the appeal with costs but reduced the award to one head of cattle. Despite the fact that the case had its inception in a Chief's Court where only claims known to Bantu Law may be heard the Bantu Affairs Commissioner decided that common law should apply in his Court. The Commissioner decided that he had heard the case *de novo* on appeal.

*Held:* That in order to effect a change of substance in the Chief's Court award the Bantu Affairs Commissioner should have allowed the appeal.

*Held:* That the party who was successful in obtaining a reduction of the award on appeal should have been awarded the costs of appeal.

*Held:* That a judicial officer may not arbitrarily change the system of law applicable.

*Held:* That only the evidence in an appeal from a Chief's Court is heard *de novo*.

Appeal from the Court of the Bantu Affairs Commissioner, Nongoma.

*Cases referred to:*

*Zwane vs. Myeni* 1937 NAC. (N & T) 73 (Warner 283).

*Ndlanya vs. Tobela* 1938 NAC. (C & O) 12 (Warner 535).

*Rules referred to:*

Chief's Courts Rule 12 (4).

*Works referred to:*

Warner's "A Digest of S.A. Native Civil Case Law, paras. 886-887.

Craig, Permanent Member:

In a chief's Court Plaintiff (now Respondent) sued Defendant (now Appellant) for certain five head of cattle and was successful. An appeal to the Bantu Affairs Commissioner's Court was dismissed with costs but the Chief's judgment "For the Plaintiff for five head of cattle plus R2.50 costs" was altered to "For Plaintiff for one white and black ox and R2.50 costs".

Defendant noted an appeal to this Court against a part of that judgment on the following ground:

"The Defendant having substantially succeeded in reducing the number of cattle awarded to the Plaintiff in the Chief's Court costs of appeal to the above Court (Bantu Affairs Commissioner's Court) should have been awarded to him".

The appeal was noted late but good cause having been shown condonation was granted.

It is obvious that the Commissioner has erred considerably in this case.

The first error, though it does not affect the result of the case at all, was to conclude that the case should, apparently, be decided according to common law principles. He overlooked the facts (1) that the case had its inception in a Chief's Court where only claims known to Bantu Law may be heard and (2) that purchase and sale is, in fact, known to such law. A judicial officer may not arbitrarily change the system of law applicable.

I have some doubts as to the propriety of using the expression *de novo* to describe in its entirety the re-hearing or re-trial of a case as prescribed by Cief's Court's Rule 12 (4) which requires A Bantu Affairs Commissioner's Court to "re-hear and re-try the case *as if* it were one of first instance in that Court . . . .". According to the Oxford Illustrated Dictionary it means to "start afresh" and that is not what happens in the case of an appeal. It is only the evidence which is recorded *de novo* vide Zwane *vs.* Myeni 1937 N.A.C. (N. & T.) 73 (Warner 283).

The Commissioner's statement that Plaintiff sueceeded in both the Chief's Court and in his Court smacks of fantacy. In the former Court Plaintiff was, indeed, successful and was awarded the five head of cattle and costs. Defendant, however, launched an attack on the Chief's Court judgment by the only means available to him viz. by way of appeal to the Bantu Affairs Commissioner's Court and was substantially successful therein in that the Chief's award of five head was reduced to one head of cattle. It is not clear why the Commissioner introduced argument in regard to the "main prineiple" of the case in his reasons for judgment and quoted paragraphs 886-887 of Warner's "A Digest of S.A. Native Civil Case Law" in support of his award of costs to Plaintiff/Respondent in the appeal to his Court. The "main principle" of this case remained unchanged and Plaintiff's success in the Chief's Court was confirmed, to a lesser extent, and he was not deprived of his costs in that Court. Appeal proceedings carry their own costs quite separate and distinct from those of the Court *a quo* and Defendant having succeeded substantially on appeal by having the Chief's award reduced by four-fifths was entitled to an award of appeal costs—Ndlanya *vs.* Tobela 1938 N.A.C. (C & O.) 12 (Warner 535).

The Commissioner erred in dismissing the appeal. The variation of the Chief's judgment was one of substance and not merely of form and it was incumbent upon the Court to allow the appeal in order to effect it.

The Commissioner's gratuitous adverse comments on the sufficiency of Defendant's reasons for applying for condonation of the late noting of his appeal to this court would have been better left unsaid as that was a matter for cognizance by this Court alone after hearing argument thereon.

In the result the appeal was allowed with costs and the Bantu Affairs Commissioner's judgment was altered to read "The appeal is allowed with costs and the Chief's judgment is altered to read 'For Plaintiff for one black and white ox with costs' ".

Cronjé, President and Potgieter, Member, concurred.

For Appellant: Mr W. E. White i.b. Uys & Boshoff, Vryheid.

For Respondent: In default.

# NORTH-EASTERN BANTU APPEAL COURT

**MPANZA vs DUBAZANE**

B.A.C. CASE 47 OF 1969

ESHOWE: 2nd October 1969. Before Cronjé, President and Craig and Potgieter, Members.

## PRACTICE AND PROCEDURE

Res judicata—*Absolution judgment does not found—Chief's Court—Written record—Criterion.*

*Summary:* A Bantu Affairs Commissioner, *mero motu,* raised the defence of *res judicata* and holding that it was applicable dismissed an appeal. Two cases were tried by a Chief in which the subject matter was the same but in the first of which present Plaintiff's father was Plaintiff. The Chief dismissed the father's claim with costs. This dismissal figured on the Chief's "Written Record" as the judgment of his Court. The Bantu Affairs Commissioner perused the Chief's reasons for judgment in that first case and decided that he had really meant to give judgment "For Defendant with costs".

*Held:* That the Chief's written record was the criterion and the judgment which appeared thereon was one dismissing the claim with costs and this amounted to one of absolution.

*Held:* That an absolution judgment is not pleadable as *res judicata.*

Appeal from the Court of the Bantu Affairs Commissioner, Mahlabatini.

*Works and cases referred to:*

Warner's "A Digest of S.A. Native Civil Case Law" Para. 270 and the cases there summarised.

Jones & Buckle's "The Civil Practice of the Magistrates' Courts of S.A., Sixth Edition, pages 771-773.

Craig, Permanent Member:

This is an appeal against a judgment in which the Bantu Affairs Commissioner, *mero motu,* raised the point of *res judicata,* held that the latter was applicable and allowed, with costs, an appeal against a Chief's court judgment whereby judgment was awarded to Plaintiff and altered the latter judgment to "claim dismissed being *res judicata* with costs R6.00".

The appeal by Plaintiff was noted on the following grounds:

"1. The Court erred in accepting Defendant's evidence that he (Defendant) did in fact not rob Plaintiff of her money.

2. The Court erred in not calling Plaintiff's witnesses to substantiate her claim.

3. The case handed in as an exhibit does not figure in the present case and the Court should have ignored it."

Grounds 1 and 2 will be ignored as Defendant had not yet given evidence and the Commissioner stopped the trial after his "res judicata" decision so that Plaintiff's opportunity to call her witnesses had not yet arrived.

The judgment in the case heard earlier by the Chief in which Plaintiff's father sued Defendant for the same R21 which figures in the instant case and on which the Commissioner based his decision of *res judicata* reads "The claim is dismissed and lose your costs R5.50". He explained that it was clear from the Chief's reasons for judgment in that case that "he, in fact, gave a judment for defendant and that the wording of the judgment 'claim dismissed with costs R5.50' should have been 'For defendant with costs' ".

I question the Commissioner's right to, in effect, bring about an amendment of the Chief's "Written Record" in this summary manner. The Record is the criterion in so far as the pleadings and judgment in a Chief's Court are concerned and the Commissioner's attention is directed to the decision summarised by Warner at paragraph 270 of his "A Digest of S.A. Native Civil Case Law".

The unchallenged recorded judgment of the Chief in the earlier case whereby the claim was dismissed stands and amounts to no more than a judgment of absolution. The dismissal of an action is not pleadable as *res judicata* vide Jones & Buckle "The Civil Practice of the Magistrates' Courts of S.A." Sixth Edition, pages 771-773 and. accordingly, I hold that in the instant case the Commissiioner erred in his conclusion.

The appeal is allowed with costs, and the Bantu Affairs Commissioner's judgment is set aside and the case is referred back to the court *a quo* for hearing to a conclusion.

Cronjé, President and Potgieter, member, concurred.

Appearances: Both parties in person.

# SOUTHERN BANTU APPEAL COURT

## NGUTHANI KHOTI AND 3 OTHERS vs VALIPATHWA NGQOPOLWANA

B.A.C. CASE 61/68

UMTATA, 28 August 1969. Before Yates, President and Messrs Adendorff and Muir, Members

## DAMAGES

*Liability of forest guards for injuries caused while affecting an arrest.*

*Summary:* Plaintiff was arrested while poaching in a forest. He claimed damages for injuries inflicted by the forest guards who apprehended him.

*Held:* That forest guards were entitled to use force in the execution of their duties provided it did not exceed the necessities of the occasion. The onus was on Plaintiff to establish the unlawfullness of the assault and upon Defendants to justify the amount of force used.

Appeal from the Court of the Bantu Affairs Commissioner, Flagstaff.

Yates (President):

Yates (President) delivering the judgment of the Court:

This is an appeal against a judgment of the Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) against Defendants 1 and 4 (now Appellants) for damages of R100 with costs. Plaintiff was ordered to pay the costs of Defendants 2 and 3. The judgment does not indicate whether Defendants 1 and 4 liable "jointly" or "jointly and severally" nor has a judgment in favour of Defendants 2 and 3 been recorded although this is obiviously what is intended.

Plaintiff sued for damages of R500 alleging that the four Defendants had assaulted him with sticks, bicycle chains and other instruments causing him severe injury, viz. four open head injuries, severe injury to the back of the right shoulder and to the spine and as well the first and third fingers of the right hand and the second finger and thumb of the left hand were broken. He alleged further that the first and third fingers of the right hand and the thumb of the left hand were totally incapacitated and that he had been detained in hospital for 15 days.

Defendants denied the assault and averred that Plaintiff was one of a group who were illegally poaching in the Camtshole Forest. One or more of the Defendants attempted to arrest him but he forcibly resisted. One or more of the Defendants then, in the execution of their duty, arrested the Plaintiff using such force as was necessary to overcome his resistance.

An appeal against the judgment has been noted by Defendants 1 and 4 on the grounds (i) that the Presiding Officer erred in his approach to the case, viz. that the onus was on Defendants to prove that the measures taken by them to overcome the resistance put up by the Plaintiff were necessary; (ii) that the judgment is against the weight of evidence and the probabilities of the case; and (iii) that the amount of damages awarded is excessive.

It is common cause that the four Defendants are employed as forest guards. They therefore fall into the same category as police officers who are on occasions compelled to exercise a measure of force in the execution of their duties and they are in law entitled to do so provided the force employed does not exceed the necessities of the occasion or the limits of due moderation. Maasdorp Vol. IV The Law of Delicts, 7th Ed. at p. 22.

In the instant case Plaintiff admitted that he was illegally in the forest poaching game and that the Defendants had a right to arrest him. He also stated that he started fighting when he was about to run away and struck blows at them with a hunting stick. He said further that Defendants were justified in using force until he fell but his complaint concerned the beating he received thereafter.

Plaintiff's evidence that he entered the forest alone and was first assaulted by Defendant 1 who used a bicycle chain attached to a stick, then by Defendant 4 who carried a stick loaded with iron and also by Defendants 2 and 3 who carried a knob stick and hunting stick respectively was not supported in any way. That forest guards should carry sticks loaded with bicycle chains and iron is in any event unlikely bearing in mind that Defendants 3 and 4 were armed with revolvers. The Assistant Bantu Affairs Commissioner did not believe Plaintiff's evidence that Defendants 2 and 3 assaulted him and also did not accept his denial that Defendant 4 had pointed a revolver at him. Mr Hughes drew the Court's attention to certain discrepancies in the evidence of Defendants 1 and 4 but considering the nature of the occurrence and the fact that evidence was given over a year thereafter they were not sufficient in my view to upset the credibility of the witnesses and the Commissioner was correct in accepting their version in preference to that of Plaintiff.

Defendant 4 stated that after he and Defendan 1 had surprised Plaintiff and another poacher they took to flight. He chased Plaintiff who was carrying a duiker and hit him on the hip Plaintiff then dropped the duiker and struck at him with a loaded stick. The Commissioner in his reasons for judgment commented that Defendant 4's action in striking at Plaintiff was inexplicable but that the latter showed fight is confirmed by his own evidence. Defendant 4 and Plaintiff then exchanged blows and 4 hit Plaintiff on the shoulder causing him to drop his stick. Defendant 4 then blew his whistle and Plaintiff picked up his sticks and set his dogs on Defendant 4 who drew his revolver, and fired at the dogs but missed. The other guards heard the whistle and the shot, both of which Plaintiff denied. According to Defendant 4 Plaintiff then raised his stick and it was at that point that Defendant 1 ran up and seeing Plaintiff about to strike Defendant 4, delivered a blow at his head which knocked

him down. The Commissioner came to the conclusion that this blow was not justified because Defendant 4 was covering Plaintiff with a revolver and had threatened to shoot him if he struck. However, there is no evidence to show that Defendant 1 was aware of this or that he was not justified in assuming that because Plaintiff was standing with a raised stick he was about to strike Defendant 4.

There is no evidence whatever to confirm Plaintiff's statement that he was assaulted after he fell and it may well be that the injuries to his hands were caused by blows received while he was being arrested. He himself stated that the first blow delivered by Defendant 4 landed on his left hand.

There is no doubt that Plaintiff was fairly severely injured but in cases such as this the Court will not enquire too meticulously into whether the amount of forse used was commensurate with the legal object in hand; in this case the apprehension of Plaintiff who was armed and resisting arrest. See Ngqeleni and Another v. Vembe, N.A.C. (S.D.) 260 (1950).

The onus was on Plaintiff throughout to establish the unlawfulness of the assault but the burden of proof justifying the assault was on the Defendants (see Pillay v. Krishna and Another, 1946 A.D. 946 at P. 953) and this onus they have discharged.

The appeal is allowed with costs and the Assistant Bantu Affairs Commissioner's judgment is altered to read "For Defendants with costs".

*Appearances:*

For Appellants: Mr K. Muggleston.

For Respondent: M. F. G. Hughes.

A. J. Adendorff, Permanent Member, concurred.

D. B. Muir, Member, concurred.

# SOUTHERN BANTU APPEAL COURT

## MDINGI BALI AND OTHERS vs SOLOMON LEBENYA

B.A.C. CASE 69 OF 68

UMTATA: 27 August 1969. Before Yates, President; Adendorff and Jordaan, members.

## BANTU LAW AND CUSTOM

*Custom—payment of fee for permission to conduct initiation ceremony.*

*Summary:* Plaintiffs sued for the return of monies paid under protest by them to the Chief for permission to hold circumcision lodges contending that payments were made under threat of refusal to grant such consent and that the Chief was not by law or custom entitled to such payments.

*Held:* That Plaintiffs were members of Xhosa minority in a predominantly Sotho area and were subject to Xhosa custom as practised in that area.

According to custom in that area the Chief's permission was necessary before a circumcision lodge could be held and whereas the Sothos gave the Chief portions of a beast slaughtered as part of the ceremony the Xhosas originally paid a hamel and now were required to pay R10 in lieu thereof.

Payment had been made over a number of years and was now accepted as customary.

Appeal from the Court of the Bantu Affairs Commissioner, Mount Fletcher.

Yates, President:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Defendant (now Respondent) with costs in an action in which Mdingi Bali and 12 other Plaintiffs (now Appellants) sued him for the return of R10 to each of them alleging in their particulars of claim that: "3. Plaintiffs' claim is against Defendant for repayment of the sum of R10 in respect of each Plaintiff which sum was paid by Plaintiffs to Defendant, in or about March 1967 under protest in order to secure the customary consent by a tribal chief to the holding of various initiation ceremonies. 4. The said payment was made under threat of refusal to grant such consent and on the express or implied condition that it would be refunded if not due. 5. Defendant was in fact and in law not entitled to such payment but fails, refuses or neglects to refund the sum of R130 despite demand."

Defendant denied the allegations in regard to all but five of the Plaintiffs to which number a sixth was added later and in respect of those pleaded that he was in fact and in law entitled to payment of the customary fees to conduct initiation ceremonies.

The claim of the other Plaintiffs was withdrawn and the appeal is confined to these six.

The appeal has been noted on the grounds:

"1. That the Court erred in holding that the practice of demanding a fee for the privilege of holding a circumcision lodge has the force of a Bantu custom in the area;

2. That even if it is held to be a custom in the area it is invalid and unenforceable in that, inter alia—

(a) it is neither Sotho nor Xhosa custom; and/or

(b) it discriminates against one section of the community in the area, i.e. those of Xhosa descent; and/or

(c) it is contrary to public policy and *contra bonos mores.*

3. That by reason thereof the Defendant was not in fact and in law entitled to payment of the fees admitted in the plea."

The Appellants are members of a Xhosa tribe residing in the predominently Sotho area prescribed over by the Defendant, Chief Solomon Lebenya, so that Sotho custom prevails. See the cases cited in Warner's "Digest of S.A. Native Civil Case Law" at paragraphs 621 to 640.

It is clear from the evidence of both sides that before conducting a circumcision school in the area it was necessary to obtain permission from the Chief; but according to the witnesses for Plaintiffs the headman of the location as representative of the Chief, was sometimes approached.

It was also established that amongst the Sotho no fee is charged but at a subsequent stage a beast which is supplied by the conductor of the lodge is slaughtered and portions thereof, viz. the head, skin and ribs are then given to the Chief who usually attends the ceremony. The gift of the portions of the carcase is therefore customary and part of the ceremony.

Defendant and the other four elderly Sotho witnesses who gave evidence on his behalf stated that before obtaining permission to conduct a lodge it was customary for the Xhosas to pay a fee to the Chief which was originally a hamel or its equivalent of R2 and no good reason was advanced why this testimony should not have been accepted. The fee was later stepped up to R4 and between 1964 and 1965 it was increased to R10. The first Plaintiff to give evidence, Mdingi Bali, stated that he had conducted many lodges in the time of Defendant's predecessor Chief Kgorog Lebenya and confirmed that he had had to pay R2. He now objected to the increase of the fee to R10. The other five Plaintiffs and their eight witnesses, however, stated that although they always had to get permission to hold a lodge they had never before been asked to pay anything. Two of these witnesses, Friday Nobenqwa and Morken Tsbangoyi, said they had previously conducted four lodges each whilst the other witnesses varied from none to two and in every case they stated that they had not approached the Chief but had been given permission by the local headman. The fact that Defendant held a pitso in 1965 where he notified the people that the fee was to be raised from R4 to R10 is a clear indication that the custom of paying a fee existed—even though it may not have been strictly enforced.

Previously the Xhosa lodges had been held near their kraals so that the fact that a circumcision lodge was being held would perhaps not have become generally known but when the fee was raised it was also decided that such lodges would in future only be held in the mountains in areas restricted to that purpose, as was the case for the Sotho lodges. Thereafter control was naturally much easier. The objection to payment is undoubtedly due to the increase in the fee. The increase was justified, however, according to the evidence, because the cost of a hamel had risen over the years from R2 to at least R10. Furthermore now that lodges of both Sotho and Xhosa were conducted on the mountains it brought the payments of both sections more into line. The Commissioner accepted that the Xhosas had in fact paid for permission to conduct lodges over a number of years and this Court has not been persuaded that they have not done so.

Mr Muggleston contended that if the practice of paying a fee was held to be customary it was not an accepted Xhosa custom but it seems to me that it is a custom pertaining to the Xhosas living in that area and even though it does not apply to the community at large in that district it does apply to that particular section. The Xhosas are not required to comply with the Sotho custom of allotting portion of a beast to the Chief but that remains a custom nevertheless.

Mr Muggleston also argued that it was contrary to public policy that people should be forced to give presents to a Chief for something he was required to do in his official capacity but as pointed out by Mr Hughes there was no compulsion on anyone to conduct a lodge nor was the Chief required by any law to give permission.

During the hearing of the case the attorneys for the parties agreed that the question to be decided was whether or not the custom alleged in Defendant's plea existed. The right of the payers to recover payments made unwillingly was not a point in issue.

The answer is in the affirmative and the appeal is dismissed with costs.

An application was made for costs on the higher scale to be awarded but this is not justified either by the length of the record or the importance of the legal issues involved.

Adendorff and Jordaan, Members, concurred.

*Appearances:*

For Appellants: Mr K. Muggleston.

For Respondent: Mr T. G. Hughes.

# SOUTHERN BANTU APPEAL COURT

**BELMAN TEZILE TESTILE vs JIM MTAMO**

B.A.C. CASE 77 OF 1968

KING WILLIAM'S TOWN: 27 May 1969, before Yates, President; Adendorff and Neethling, Members.

## DAMAGES FOR ASSAULT

*Quantum—For loss of eye and other injuries.*

*Summary:* General damages of R500 were awarded against Defendant for injuries suffered by Plaintiff as a result of an assault in which he lost his right eye and sustained a fractured left arm and lacerations of the head.

On appeal the amount awarded was reduced to R300.

Appeal from the Court of the Bantu Affairs Commissioner, Kirkwood.

Yates, President:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) for R500 damage and costs in an action in which he sued Defendant (now Appellant) for an amount of R5,000 as general damages which he alleged resulted from an unlawful assault upon him by Defendant in consequence of which he suffered the loss of his right eye, a fractured left arm and lacerations of the head.

Defendant in his plea stated that should the Court find that Plaintiff had sustained some injuries then he (Defendant) acted in self defence in repelling the premeditated assault by Plaintiff and two others who trespassed on his premises and who, whilst under the influence of liquor, assaulted him with sticks and kieries.

An appeal has been noted against this judgment on various grounds set out in a lengthy notice of appeal which amount to this:

(1) That no evidence was led as to the pecuniary value of the damages suffered by Plaintiff;

(2) that the judgment was against the weight of evidence and the probabilities of the case; and

(3) that the damages awarded were in any event excessive.

In regard to (1) above it is correct that Plaintiff gave no evidence in regard to the pecuniary value of the damages suffered by him but the failure of Plaintiff's Attorney to lead formal evidence in this respect is, to my mind, a mere technicality, bearing in mind that the claim for damages was the basis of the action and Defendant was not prejudiced by this omission. The only ground on which the damages were claimed was that of bodily injury where Plaintiff is not required to put a separate

money value on each different element of the general damages he has suffered. See *Reid N.O. v. Royal Insurance Co.* 1951 (1) S.A. 713(T). Any value Plaintiff might have placed on his injuries would merely be an estimation and the duty rested on the Court to decide on an adequate amount to award for pain, suffering and permanent disability, if it was satisfied that damages were payable.

According to Plaintiff's evidence he went to a feast on a farm at Kirkwood where he partook of food and liquor. Defendant was also there singing and making a nuisance of himself and, after Plaintiff had asked others to tell him to stop making a noise, Defendant became aggressive but he was calmed down and went to sit at the entrance. Later when he (Plaintiff) felt he had had sufficient to drink he left for home with Geelbooi and Johnson and on the way, while walking along a footpath, he was assaulted by Defendant and although he attempted to defend himself he sustained injuries to his head which resulted in the loss of his right eye and he also suffered a fracture of his left arm which he cannot now straighten. He was detained in hospital for 35 days in all.

Geelbooi confirmed Plaintiff's evidence in all material aspects and the Commissioner in his reasons for judgment stated that Plaintiff gave his evidence in a satisfactory manner and made a good impression.

Mr Radue drew attention to several discrepancies in the evidence of Plaintiff and Geelbooi but as pointed out by the Commissioner in his "reasons for judgment" the omissions and discrepancies were unimportant and insufficient to throw doubt on their veracity bearing in mind that they had been drinking and that Plaintiff did suffer serious injuries.

According to Defendant it was Plaintiff who was troublesome at the feast and he (Defendant) left early to avoid trouble. Later when in his home he heard Plaintiff call him and when he went out Geelbooi hit him on the chest with a kierie. He then ran inside to fetch his kierie and a fight ensued in which Plaintiff fell down. He alleged that he acted in self-defence but failed to explain why he did not remain in his house after Geelbooi had hit him. There was apparently no necessity for him to venture out into danger again. Furthermore in his evidence in chief he said that after fetching his stick he exchanged blows with both Plaintiff and Geelbooi but in answer to the Court he stated that Geelbooi did not assult him any further while he was busy with Plaintiff. However, it is unlikely, if his story is true, that after first assaulting Defendant Geelbooi would them stand aside and allow his friend, the Plaintiff, to be severely injured without attemping to help him.

Defendant's witness Norman stated in his evidence in chief that Geelbooi struck Defendant first but under cross-examination said that he was inside the house at the time and only heard the blows. He followed Defendant out after he returned for his stick and then saw Geelbooi and Plaintiff strike him, thus contradicting Plaintiff's evidence in this regard.

The Commissioner had the advantage of hearing and seeing the witnesses and accepted the evidence for Plaintiff in preference to that for Defendant and it has not been shown that he was wrong in having done so.

In regard to the question of damages the difficulties attendant on making a fair assessment of damages for pain and suffering are referred to in the case of *Sandler v. Wholesale Coal Suppliers Ltd* 1941 A.D. 194 at page 199. It is sometimes helpful and instructive to have regard to awards of damages made by Courts in comparable cases. See *Hulley v. Cox* 1923 A.D. 234 at page 246. In the case of *Mangcobo v. Mqatawa* 4 N.A.C. 34 damages of R100 were awarded for the loss of an eye but this was in 1919. R150 was awarded for similar injuries in 1940, see *Mvinjelwa v. Siralo* 1940 N.A.C. (C. & O) 77, and in 1953 R300 which included wages for three months amounting to approximately R80, was awarded. See *Ngesi v. Ngcule & ano.* 1953 N.A.C. 274 (S). In the case of *Mbonda v. Nkcenkce* 1963 N.A.C. 80 (N.E.) an amount of R400 of which approximately R300 was for pain and suffering following an assault as a result of which Plaintiff lost his left eye and sustained multiple injuries to his mouth and head, was not appealed against.

In assessing the amount which should be awarded to Plaintiff as damages the Court must be guided by the principles laid down in Sandler's Case *supra,* and that of *Radebe v. Hough* 1949 (1) S.A. 380 A.D. in which it was stated that the amount of damages to be awarded for pain and suffering should not vary according to the standing of the person injured. See also *Quongqa v. Dyan & ano.* 1 N.A.C. 352 (S.).

Considerable difficulty is occasioned in the instant case, however, by the paucity of evidence in regard to the damages. Plaintiff spent over a month in hospital but has given no indication of the amount of pain he suffered. However, the loss of an eye is a serious impairment. His left arm has been permanently damaged but there is no medical evidence as to how this will affect him or the extent of the injury. He is still employed at the same salary. Taking all the factors into consideration I am of the opinion that an amount of R300 would be fair in the circumstances of this case.

The appeal is allowed with costs and the judgment of the Court below altered to read: "For Plaintiff for R300 and costs".

Adendorff and Neethling, Members, concurred.

*Appearances:*

For Appellant: Mr R. Radue.

For Respondent: Mr M. Anderson.

## AMPTENARE VAN DIE BANTOE-APPÈLHOWE, 1969.
## OFFICERS OF THE BANTU APPEAL COURTS, 1969.

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### SENTRALE BANTOE-APPÈLHOF.
### CENTRAL BANTU APPEAL COURT.

VOORSITTER/PRESIDENT: H. J. POTGIETER.
PERMANENTE LEDE/PERMANENT MEMBERS:
J. R. THORPE, D. O. BOWEN.

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### NOORD-OOSTELIKE BANTOE-APPÈLHOF.
### NORTH-EASTERN BANTU APPEAL COURT.

VOORSITTER/PRESIDENT: E. J. H. YATES: 1/1/69—30/4/69.
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PERMANENTE LID/PERNANENT MEMBER: R. M. CRAIG.

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### SUIDELIKE BANTOE-APPÈLHOF.
### SOUTHERN BANTU APPEAL COURT.

VOORSITTER/PRESIDENT: N. P. J. O'CONNELL: 1/1/69—31/3/69.
VOORSITTER/PRESIDENT: E. J. H. YATES: 1/5/69—31/12/69.
PERMANENTE LID/PERMANENT MEMBER: A. J. ADENDORFF.

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